TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 811

CLAY COOKE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 5, 1934

CERTIORARI GRANTED APRIL 9, 1934

(30,174)

(30,174)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924

No. 311

CLAY COOKE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

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[fol. 1] CAPTION—Omitted

IN UNITED STATES DISTRICT COURT

No. 2241

THE UNITED STATES OF AMERICA
versus
CLAY COOKE and J. L. WALKER

STATEMENT OF FACTS

Be it remembered that in this Court on the 5th day of February, 1923, came on regularly for trial cause No. 984 at law, wherein W. W. Wilkinson, as trustee of the Walker Grain Company, a bankrupt, was plaintiff, and J. L. Walker was defendant, plaintiff's suit being to recover of the defendant, J. L. Walker, $85,000 alleged to have been paid the Walker Grain Company upon three certain promissory notes theretofore executed and payable to the American National Bank of Fort Worth, Texas, the plaintiff alleging that said Walker Grain Company in this Court was duly adjudged a bankrupt as of date August 16, 1918. That said J. L. [fol. 2] Walker as president and controlling stockholder of the Walker Grain Company had personally in writing guaranteed the payment of said notes, and was therefore legally liable thereon, and that as such guarantor that J. L. Walker occupied the position of a general creditor of the estate of the Walker Grain Company, and that all the payments on said notes, aggregating $85,000 were made really for the benefit of said J. U. Walker to enable him to collect a greater percentage of his debt than other creditors of the said company of the same class. That said company was insolvent at the date of each payment; that all of same were made within four months prior to the filing of the petition in bankruptcy, and under such circumstances as to constitute a voidable preference; and further, that all of said payments were made with intent to hinder, delay and defraud the creditors of said company and were therefore recoverable by the trustee of the same. All of which allegations and right asserted by the plaintiff to recover were duly denied by said defendant and said cause was submitted to a jury selected by the parties, composed of twelve good and lawful men as follows:

E. G. Thomas, Foreman, R. F. Harris, M. M. Riggs, M. L. Munsie, W. G. Baker, R. A. Bennett, Fred Freeman, H. G. Greer, I. B. Widner, A. C. Lassiter, Fine Coulson and J. L. Ross. The trial of said cause was long, laborious and most tedious, through which the Judge of this Court, undertook, as best he could to control and direct the trial with impartiality and without prejudice or bias to either party, as the stenographic report of said proceedings will fully verify. The introduction of evidence and the argument of counsel was concluded February 14th, whereupon the Court over- [fol. 3] ruled a motion of the plaintiff for an instructed verdict

against the defendant, J. L. Walker, for the full amount sued for, and submitted the decision of the case entirely to the jury without comment or expression of opinion by the Court, but on the other hand, specifically instructing the jury to disregard any opinion the jury might feel the Court entertained as to the facts, and to reach their own conclusion and verdict irrespective of the Court's opinion, if any had been expressed, as the written charge of the Court on file with the papers of the case fully show.

The jury after deliberating earnestly for the larger part of two days, at five-thirty P. M. February 15th returned into open Court their verdict as follows:

"We the jury find for the plaintiff the amount of $56,484.65, with interest at the rate of six per cent from July 15, 1922.

E. G. Thomas, Foreman."

Be it further remembered that on the following day at the hour of 11:15 A. M. while the Court was open and engaged in the trial of cause at law No. 1000, the Union Terminal Elevator Company vs. the Fort Worth Elevators Company, and during a ten minutes recess for rest and refreshments, the said J. L. Walker and his attorney of record, Clay Cook, Esq., were guilty of misbehavior in the presence of this Court and so near thereto as to obstruct the administration of justice, the said Clay Cooke by writing a letter, and the said J. L. Walker by delivering same to the judge of this Court within a few feet of the Court room where said cause No. 1000 was then on trial and in the Judge's chambers adjoining said Court [fol. 4] room, the said Clay Cooke also being present therein, which said letter was not a filed paper in said cause and was not so intended, but was delivered in a sealed envelope marked "personal" and was full of impertinence and insult to the Court, and on the whole was highly contemptuous, which letter is as follows:

EXHIBIT TO STATEMENT OF FACTS

Fort Worth, Texas, February 15, 1923.

Hon. James C. Wilson, Judge U. S. District Court, Fort Worth, Texas.

DEAR SIR:

In re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.; in re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker; in re No. 1001, in Bankruptcy, Walker Grain Company

Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, a- Fort Worth,

I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will con-
[fol. 5] sent to your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having however proceeded to enter judgment in the petition for review of the action of the Referee on the summary orders against the Farmers & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer, and an honest man is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears
[fol. 6] against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment Your Honor's pleasure with respect to the matters herein presented, so that further steps may be avoided.

With very great respect, I beg to remain,
Yours most truly,

Clay Cooke.

Said letter was written concerning important litigation and matters then pending before the Court and as to which, even in the personal letter, the disqualification of the judge of this Court was not suggested, namely, the form and substance of the judgment to be entered upon the jury's verdict in said cause No. 984, and motion for new trial in said cause, notice of filing of same having been given in open Court, as well as in the letter, and the motion for new trial in cause No. 1001, in bankruptcy.

Therefore, since the matters of fact set forth herein are within the personal knowledge of the judge of this Court, and since it is the view of this Court that said letter as a whole is an attack upon the honor and integrity of the Court, wherein it charges that the judge of this Court is not big enough and broad enough to truly pass upon matters pending therein, and wherein it charges in effect [fol. 7] that the judge of this Court has allowed himself to be improperly approached and influenced and whispered to by interested parties against a litigant in the Court, and since it is the view of this Court that such an act by a litigant and his attorney constitutes misbehavior and a contempt under the law and that the threats and impertinence and insult in said letter were deliberately and designedly offered with intent to intimidate and improperly influence the Court in matters then pending and soon to be passed upon, and to destroy the independence and impartiality of the Court in these very matters, it is ordered that an attachment immediately issue for the said J. L. Walker and Clay Cooke, and that the Marshal of this Court produce them instanter before this Court to show cause, if any they have, why they should not be punished for contempt.

SUMMONS & SHERIFF'S RETURN

To the Marshal of said District, Greeting:

You are commanded to attach the bodies of Clay Cooke and J. L. Walker, and each of them, if found in said district, and then safely keep so that you have them before the Honorable District Court of the United States of America for the Northern District of Texas, at the City of Fort Worth, Texas, instanter, then and there to show cause, if any they have, why they should not be punished for criminal contempt, and have you then and there this writ, certifying how you have executed the same.

Witness, the Honorable James C. Wilson, Judge of the District Court of the United States for the Northern District of Texas, and the seal of said District Court at Fort Worth, this the 26th day of [fol. 8] February, in the year of our Lord, nineteen hundred and twenty-three, and of American Independence, the 147th year.

Louis C. Maynard, Clerk, by G. B. Buckley, Deputy.

Marshal's Return

Received this writ the 26th day of Feb'y, 1923, and executed the same on the 26th day of Feb'y., 1923, by attaching the bodies of Clay Cooke and J. L. Walker, and taking them before the Hon. James C. Wilson, U. S. District Judge, at Fort Worth, Texas, who ordered them in jail for thirty days.

A. R. Eldredge, U. S. Marshal N. D. T., by W. P. Stokes, Deputy.

In re CLAY COOK and J. L. WALKER, Respondents

No. —

Be it remembered that on the 24th day of February, 1923, the Court entered an order herein directing that the respondents be arrested and brought before the Court to show cause, if any they have, why they should not be punished for contempt of this Court, committed by delivering to the Judge of the Court in his chambers adjacent to the Court room of this Court at Fort Worth, Texas, the letter hereinafter set forth. And on the 26th day of February, 1923, respondents were brought before the Court by the Marshal under said process, whereupon the Court heard and considered the statements made by and on behalf of respondents at the bar of the Court, [fol. 9] and found the same insufficient as cause shown why respondents should not be held in contempt of this Court and punished accordingly.

COURT'S STATEMENT OF FACTS AND JUDGMENT

The Court makes this statement of facts constituting the contempt which the Court finds was committed by the respondents and each of them:

In this Court on the 5th day of February, 1923, came on regularly for trial, cause No. 984, at law, wherein W. W. Wilkinson, as Trustee of the Walker Grain Company, a bankrupt, was plaintiff, and J. L. Walker was defendant, plaintiff's suit being to recover of the defendant, J. L. Walker, $85,000 alleged to have been paid the Walker Grain Company upon three certain promissory notes theretofore executed and payable to the American National Bank of Fort Worth, Texas, the plaintiff alleging that said Walker Grain Company in this Court was duly adjudged a bankrupt as of date August 16, 1918. That said J. L. Walker, as president and controlling stockholder of the Walker Grain Company had personally in writing guaranteed the payment of said notes, and was therefore legally liable thereon, and that as such guarantor that said J. L. Walker occupied the position of a general creditor of the estate of the Walker Grain Company, and that all payments on said notes, aggregating $85,000 were made really for the benefit of the said J. L. Walker to enable him to collect a greater percentage of the debt than other creditors of the said company of the same class. That said company was insolvent at the date of each payment; that all of same were made within four months prior to the filing of the petition in bankruptcy, and under such circumstances as to constitute a voidable preference: and further, that all of said payments were made [fol. 10] with intent to hinder, delay and defraud the creditors of said company, and were therefore recoverable by the trustee of the same. All of which allegations and right asserts by the plaintiff to recover, were duly denied by said defendant and said cause was

submitted to a jury selected by the parties, composed of twelve good and lawful men, as follows:

E. G. Thomas, Foreman, R. F. Harris, M. M. Riggs, M. L. Munsie, W. G. Baker, R. A. Bennett, Fred Freeman, H. G. Greer, I. B. Widner, A. C. Lassiter, Fine Coulson and J. L. Ross.

The trial of said cause was long, laborious and most tedious, through which the Judge of this Court undertook, as best he could, to control, and direct the trial with impartiality and without prejudice or bias to either party. The introduction of evidence and the argument of counsel was concluded February 14th, whereupon the Court overruled a motion of the plaintiff for an instructed verdict against the defendant, J. L. Walker, for the full amount sued for, and submitted the decision of the case entirely to the jury without comment or expression of opinion by the Court, but on the other hand, specially instructing the jury to disregard any opinion the jury might feel the Court entertained as to the facts, and to reach their own conclusion and verdict irrespective of the Court's opinion, if any had been expressed.

The jury after deliberating earnestly for the larger part of two days, at five-thirty P. M. February 15th returned into open Court their verdict as follows:

"We the jury find for the plaintiff the amount of $56,484.65, with interest at the rate of six per cent from July 15, 1921.

E. G. Thomas, Foreman."

[fol. 11] On the following day at the hour of 11:15 A. M., while the Court was open and engaged in the trial of cause No. 1000, the Union Terminal Elevator Company vs. the Fort Worth Elevators Company, and during a ten minutes' recess for rest and relaxation, the said J. L. Walker and his attorney of record, Clay Cooke, Esq., acting together, were guilty of misbehavior in the presence of this Court, or so near thereto as to obstruct the administration of justice by delivering by the hand of said J. L. Walker to the Judge of this Court, Judge James C. Wilson, within a few feet of the Court room where said cause No. 1000 was then on trial, and in the Judge's chambers adjoining said court room, a letter, the said Clay Cooke and said J. L. Walker both being present at said time and place, which said letter was not a filed paper in said cause, and was not so intended, but was delivered in a sealed envelope marked "personal" and contained impertinence and insult to the Court and was contemptuous and obviously calculated to influence the Court's action on litigation then pending before the Court, which said letter is as follows:

[fol. 12] Fort Worth, Texas, February 15, 1923.

Hon. James C. Wilson, Judge U. S. District Court, Fort Worth, Texas.

Dear Sir:

In re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker; In re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.; In re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker; In re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker; In re No. 1001, In Bankruptcy, Walker Grain Company.

Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally as a lawyer, interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will consent to your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having however proceeded to enter judgment in the petition for review of the action of the Referee on the summary orders against the Farmers & Mechanics National Bank and J. L. Walker [fol. 13] and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer and an honest man, is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest possible moment Your Honor's pleasure

with respect to the matters herein presented, so that further steps may be avoided.

[fol. 14] With very great respect, I beg to remain,

Yours most truly, Clay Cooke.

Said letter was written concerning important litigation and matters then pending before the Court, and as to which, even in the personal letter, the disqualification of the Judge of this Court was not suggested, namely, the form and substance of the judgment to be entered upon the jury's verdict in said cause No. 984, and motion for new trial in said cause, notice of filing of same having been given in open Court, as well as in the letter, and the motion for new trial in cause No. 1001, in bankruptcy.

It is therefore considered by the Court and ordered and adjudged that respondents Clay Cooke and J. L. Walker, and each of them, be and is hereby adjudged in contempt of this Court, and that each of them be punished by confinement in the County jail of Tarrant County, Texas, for the term of thirty days, and that commitment issue directed to the marshal to place in effect the order of this Court.

To which action of the Court the respondents and each of them in open Court excepted.

UNITED STATES OF AMERICA,
Northern District of Texas:

The President of the United States of America to the Marshal of the Northern District of Texas, Greeting:

Whereas, by the judgment of the Honorable, the District Court of the United States, for the Northern District of Texas, holding [fol. 15] session at Fort Worth, Texas, made and entered on the 26th day of February, A. D. 1923. In the case then pending therein and numbered 2241 and entitled The United States vs. Clay Cooke and J. L. Walker, the said Clay Cooke and J. L. Walker, defendants and each of them was adjudged to be imprisoned in the County Jail of Tarrant County, Texas, for a period of thirty (30) days each, on a charge of "Contempt of Court."

Wherefore, you are hereby commanded, that you execute the Judgment of the said Court as therein required of you, and as you are bound to do.

Herein fail not, and what you shall have done make due return.

Witness, the Honorable James C. Wilson, Judge of the District Court of the United States, for the Northern District of Texas, at Fort Worth, Texas, this the 26th day of February, A. D. 1923.

Louis C. Maynard, Clerk U. S. Dist. Court, Northern District of Texas, by G. B. Buckley, Deputy. (Seal.)

MARSHAL'S RETURN

Received this writ at Fort Worth, Texas, February 26, 1923, and executed same at Fort Worth, Texas, February 26, 1923, by deliver-

ing the within named Clay Cooke and J. L. Walker to the custody of the Tarrant County Jailer and leaving him a true copy of this writ.
A. R. Eldredge, U. S. Marshal, by W. P. Stokes, Deputy.

[fol. 16] **Bill of Exceptions**—Filed March 10, 1923

[Title omitted]

Be it remembered that on the hearing of this cause in this Court at the November Term, A. D. 1923, the Honorable James C. Wilson presiding, the following proceedings were had to-wit:

The defendant being presented in open Court in charge of the United States Marshal, the following proceedings were had, no testimony being introduced:

Judge Wilson: At this time (11 A. M.) I will call the contempt matter against Clay Cooke and J. L. Walker, attachment having been issued for these respondents.

I have requested Judge J. M. McCormick, of Dallas, to be present and act as a friend the Court in this proceeding, and have also requested the District Attorney, it being in its nature a criminal matter, to act.

I will ask the District Attorney to read the order entered in this matter.

Mr. Clay Cooke: If Your Honor please, I just got notice of this proceeding about an hour ago and I tried to arrange with Mr. Sidney Samuels to represent the respondents. Mr. Samuels is sick in bed and will not be up for a day or two. He thinks he can be up town to-morrow and will represent the respondents if he is well enough. [fol. 17] And also Judge Slay, of Slay, Simon & Smith, who came to the Court room and was here a few minutes ago, I understand, and went out to look for me. I am trying to locate Judge Slay now, and we, of course will ask for a few days to prepare for trial and get the necessary witnesses here and introduce the evidence which the respondents think is necessary in their defense.

Mr. McCormick: My understanding is that the Court sets forth matters that occurred in the presence of the Court, or so near thereto as to obstruct the administration of justice, and matters that are personally known to the Court; and under those circumstances as I understand the law, no testimony will be necessary or proper in a hearing in this Court, and it is a matter that should be promptly acted on and disposed of. I do not think it ought to be strung out by delays. There can be no testimony, there can be no necessity for testimony, the matter is within the Court's knowledge. It is not proper or usual or customary or consistant with the dignity of the Court to enter into the proposition as to whether or not the facts are true. There is no necessity for any witnesses or any delay.

Mr. Clay Cooke: We ought to be entitled to counsel in any event; and also there is another feature, in any matter where Your Honor

might conceive to be in contempt, yet there might be extenuating circumstances which would appeal to Your Honor's sense of fairness and justice in fixing whatever penalty we may be required to submit to, and in that feature of the case we always have the right I think to prove any extenuating circumstances, even though we [fol. 18] may be very guilty, and we merely ask for that reasonable time which ordinarily would be granted in any proceeding, criminal or civil to obtain the benefit of the advice of counsel. We have not been able to confer with counsel and I do not think Judge McCormick or any attorney would think of denying, even to the darkest criminal, those privileges, even though it was a criminal offense. We have that right I think under the Constitution and under the decisions of the Court, and I do not think even though within the knowledge of the Court, we should be deprived of that right—and I think all the facts are not within the knowledge of the Court. We have that right I believe and that is all we are asking for. We did not know such proceedings was going to be brought. And I think furthermore, we would have the right to prove, especially myself, the fact that I have practiced in the Courts for fifteen years and never had such a proceeding brought against me; practiced before all of the Federal Judges of Texas—they are all my friends, and I have never been so much as fined for contempt, never so much as cited for contempt. Have practiced for fifteen years in Texas before all the Courts of Texas, civil and appel-ate Courts. I think I have a right to show to your Honor my record before your Honor places a blot or stain upon it.

Whatever may be your Honor's idea; there may be motives actuating an act which might appeal to the highest sense of justice and fairness on the part of your Honor, and your Honor may attribute other motives to that act. I am merely asking for a fair hearing, even though your Honor may feel you ought to punish me. I think that no attorney, even the Government's representative, would ask me to seek anything less than a fair and impartial hearing; that is all I ask for and I think I ought to have my counsel here. The marshal [fol. 19] would not let us have any time on this proceeding—it was instanter, and I tried three attorneys, Mr. Odell, a friend of mine, and he had to go to Dallas on the ten-thirty car, and I tried Mr. Sidney Samuels and he is sick in bed, and then I tried Judge Slay and he promised me to come here and was here a few minutes ago, but he phoned Mr. Dedmon that he had stepped out to look for me. I went down to the foot of the steps and could not find Mr. Slay; he ought to be somewhere about the Court room; I don't know just where he is, but all we want is counsel and a fair show to be heard. If your Honor could postpone it for even three or four days I think we could be entirely ready for the trial.

Mr. McCormick: I protest against a postponement of the cause for any considerable time. If your Honor wants to take it up within an hour or two so as to give them an opportunity to locate counsel there would be no objection to that. There is no issue of fact; can be no issue of fact presented before the Court. Under the authorities, your Honor might at once without any notice or any preparation

whenever this matter came up, without any proof, and no proof is necessary, no proof is appropriate. Your Honor is not going to put yourself on trial. The litter has been written to you, and if that practice can be carried on in this Court it will absolutely destroy the usefulness of the Court and it is to correct that matter and it should be promptly acted on. The gentleman is a lawyer himself, and if he wants to get counsel here by say convening of the afternoon session of the Court I would have no objection to it, but it is a matter that ought to be speedily determined, because the facts are conclusive.

[fol. 20] Judge Wilson: It is now nearly fifteen minutes after eleven o'clock, Mr. Cooke, and your partner, Mr. Dedmon, came to see me about nine-thirty this morning and requested time, and I authorized him to take the original writ in this case with him to your office in order that you might see it, and gave him time in order that you might prepare to file any defense that would be pertinent here.

The attorney you mentioned, Mr. Slay, came to see me about the matter of postponing this hearing some days — and I declined to act favorably on his request.

There is just this question involved, and as stated by counsel representing the Court, these facts are within the personal knowledge of this Court. Did you deliver this letter to the Judge of this Court?

Mr. Clay Cooke: Is your Honor asking me?

Judge Wilson: I am stating the question—and does that, under the law constitute contempt. If you have any defense, you have not suggested any. This Court would be glad to give you ample time to file any pleadings pertinent and secure any evidence that might support or tend to support it, but unless you desire now to state that you have some defense you care to file and present, and indicate what that defense is to this charge, then I shall direct that this proceeding go forward, and you are fully protected, since the higher Courts are open to you to correct any error, even to the Supreme Court, that the Judge of this Court might commit here. Now, if you have any defence that is pertinent to this order, state what it is.

[fol. 21] Mr. Cooke: Now comes the defendant, Clay Cook, respondent in the above matter and respectfully shows to the Court as follows, to-wit:

That this morning a few minutes before ten o'clock, the United States Marshal came to his office with an attachment for contempt for himself and J. L. Walker; that the Marshal requested affiant to locate Mr. Walker for him and have him come to the office as the attachment was for affiant and J. L. Walker jointly; that affiant endeavored to locate Mr. Walker who has been on the road in his car from De Leon for the past three days, getting in at midnight last night; that affiant could not locate Mr. Walker at first, that he first called his residence and was then informed that Mr. Walker had left for his office; that affiant then called Mr. Walker's office and requested that Mr. Walker call him as soon as he came in; that when Mr. Walker came he asked time to get a shave, which the marshal kindly consented to, I telling the Marshal that Mr. Demon had come over to obtain a few minutes on the instanter writ; and thereupon

affiant called Mr. Sidney Samuels at his office and learned that he was in bed; that Mr. Sidney Samuels had promised to represent affiant and assist affiant in any matter growing out of proceedings in question; that Mr. Sidney Samuels is now sick in bed, and the doctor had even prohibited phone conversations. That Mr. Sidney Samuels is familiar with the proceedings and no other attorney is. Affiant then endeavors to get Judge Odell who had an engagement to leave for Dallas on the ten-thirty car and could not come to affiant's office. Affiant then phoned Judge Slay of the firm of Slay, Simon & Smith, and he came to affiant's office, arriving there only a few [fol. 22] minutes before affiant was compelled to leave with the marshal for the Court room, affiant only briefly stating to Judge Slay the facts, and Judge Slay agreed to represent affiant, without charge, and stated that he would come to the Court room and get the matter delayed in order to give us time to prepare our defense and for affiant to come on to the Court room. Affiant arrived at the Court room at 11 A. M. and was informed that Judge Slay had stepped out to locate affiant. That affiant and the said J. L. Walker have had no opportunity to confer with counsel and go through the matters and issues involved. That affiant and the said J. L. Walker believe that they have a good defense; that affiant and his client, J. L. Walker believed that the matters of fact stated in the letter were true, and that the alleged bias and prejudice of his Honor Judge James C. Wilson in the matters in which J. L. Walker was interested is a matter of common knowledge in Fort Worth, and is generally talked and discussed in Forth Worth; that affiant believed that said bias and prejudice——

The Court: That does not constitute any defense.

Mr. Clay Cooke: I'll state then something otherwise——

Judge Wilson: Repeating the insult does not constitute any defense.

Mr. Clay Cooke: I am not trying to repeat the insult, if your Honor please—that affiant read said letter——

Judge Wilson: However, as to that, you may later prepare——

[fol. 23] Mr. Clay Cooke: I am now stating my good faith.

Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record.

Mr. Clay Cooke: That affiant had heretofore been on friendly relations with said Judge James C. Wilson——

Judge Wilson: That is a matter that is wholly immaterial here it don't make any difference how friendly.

Mr. Clay Cooke: I am stating my good faith in writing the letter. And affiant believed in writing said letter that he would relieve the said Judge of the embar-assment of finding the necessary statutory affidavits of disqualification, and if said letter——

Judge Wilson: Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke: I am going to state why I did not proceed——

[fol. 24] Judge Wilson: That does not constitute any defense to this contempt charge.

Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

Judge Wilson: You may.

Mr. Clay Cooke: That affiant wrote said letter without any intention on his part of incurring contempt proceedings and without any thought of contempt and believed that said letter would not be so construed. That affiant has the highest regard for this Court as a Judge; that affiant believed in good faith the Court had heard things concerning——

Mr. McCormick: I want to interpose the objection and motion to strike out all of this, this is in accentuation of the contempt in the letter and I do not think it should be permitted. I do not think this trial should be the vehicle for answering things that are in that letter, if the gentleman wants to take a bill to the action of the Court he can do it, but I shall ask the Court not to include and shall object to the incorporation into the record at this time and place of the additional innuendoes and reflections on the Court.

Mr. Clay Cooke: We will ask permission to add this to the bill, what we want to state and what we are not allowed to state here, we can add our defenses in full.

[fol. 25] We wrote said letter after advice with other reputable counsel and after other reputable counsel had read said letter and believed that same was proper under the circumstances. The letter itself was not carefully read by myself——

Judge Wilson: I would like to know who said reputable counsel are?

Mr. Clay Cooke: Mr. P. G. Dedmon, of the firm of Cooke, Dedmon & Potter, read said letter prior to its delivery and did not call affiant's attention to anything in said letter that might be construed as contempt of the Court. That said letter was dictated and was not read by the defendant J. L. Walker, so far as affiant knows; was sealed, marked personal and delivered to the Court by the defendant J. L. Walker at the request of affiant. That affiant never made public to any one whatsoever the contents of said letter and did not intend the contents for any one except the Judge of this Court, and for the friendly purpose of relieving affiant any embar-assment in the trial of cases then pending in the Court, and if possible to relieve His Honor of any embar-assment incident to the trial of said cases, which would necessarily arise in view of the condition of the mind of affiant's client and of other parties involved in the litigation. The purpose of the letter was most friendly. That affiant has always upheld the dignity of our Courts and has upheld in all previous controversies, the fairness of the Judge of this Court, and has had numerous strong arguments——

Mr. McCormick: We object to the innuendo that this Court has been the matter of discussion.

[fol. 26] Mr. Clay Cooke: We would like to add here that affiant says he has been unable to consult with counsel; that if any one is guilty of contempt it is affiant solely, and that his client J. L.

Walker is not apprised of the contents of said letter, more than that affiant would endeavor to get the Court, by a private, personal communication, to exchange with some other judge to try the matters in which affiant's client was involved.

That affiant now here requests the privilege of a delay of not less than one day, and three days if possible, in which to prepare and present to this Court evidence of extenuating circumstances; evidence of a lack of any intention to commit a contempt of this Court; evidence of the good standing and record of affiant at the bar of Texas and other Courts and at the bar of other states during the past fifteen years, and other evidence proper to be heard in a trial of this character, where affiant's standing and reputation and what his practice is involved, and his right to practice in a matter of this kind, and affiant respectfully prays for not less than one day's time and three days if possible, to present his defense, and also to present the extenuating circumstances which might appeal to the conscience of the Court, in case the Court cannot be convinced from other evidence that no contempt was intended and none was committed.

Also affiant desires to investigate and his counsel to investigate the law for representation to the Court, as to whether a personal private letter delivered to the judge, setting up affiant's position with regard to litigation, and his client's position with regard to litigation, constitutes in law a contempt of the Court.

Affiant wrote the letter and sealed and marked it "personal" and delivered it to Mr. Walker and asked him to hand it to Judge Wilson [fol. 27] in his private office, as he was coming over to the Court to attend to some other matters, affiant's intention being to mail the letter, but Mr. Walker was coming to the Court to look up some papers in his case and offered to deliver it, and affiant gave it to him under that condition to be delivered.

If your Honor please, I would like to make this more full, because of certain interruptions, and if your Honor will give me the privilege to put in there anything I deem relevant to my defense, of course I do not ask the privilege of dictating it here, in fact, would prefer to put it in writing.

Judge Wilson: You may add—I have not heard any defense suggested here yet, but you may add any, however, if you think of any later.

Read the order, Mr. District Attorney.

Whereupon the District Attorney read the order for the arrest of the defendants, set forth in the record in said cause, whereupon the following proceedings were had:

Mr. Zweifel (to the defendants Cooke and Walker): Stand up.

Mr. Clay Cooke: To which the defendants move first, as they have moved, for a postponement and for time within which to plead and for time within which to employ counsel, as heretofore requested.

Judge Wilson: The motion is overruled.

[fol. 28] Mr. Clay Cooke: Note the exception of respondents to the action of the Court in overruling respondents' request for a reasonable time to employ counsel and plead.

Defendant excepts to the action of the Court as shown by the foregoing record in refusing to permit them any time to consult counsel or to plead in answer to said rule to show cause; that had defendants been permitted to consult counsel and answer or plead to said writ, defendants would have answered and did thereafter answer as shown by their answer filed in said cause.

The Court: The Court will have inserted in the record the pleadings of the defendant, J. L. Walker, in case No. 984 and also the charge of the Court in that case, and will also insert the pleadings of the respondent J. L. Walker, prepared by the respondent, Clay Cooke, in cause in Equity No. 266, W. W. Wilkinson, Trustee, vs. J. L. Walker.

Mr. Clay Cooke: I would like also to insert in the record the evidence in the case of W. W. Wilkinson, trustee vs. J. L. Walker, No. 984, at Law, the Q. and A. report of the testimony in that case.

The Court: That will be excluded.

Mr. Clay Cooke: Note the exceptions then and we will insert it in the bill of exceptions.

[fol. 29] The defendants excepted to the action of the court in refusing to permit in the record any of the evidence in the case above referred to.

And thereupon the following proceedings were had:

Judge Wilson: The findings of fact, all of which are within the personal knowledge of this Court, will be made in the order entered:

Now, gentlemen, it is a matter almost of common knowledge that the Courts may be lawfully criticized the same as any other branch of the government, and that it is not unlawful or a contempt of the Court for any person, including newspapers, to pass criticisms upon the judiciary, including the Federal Courts and the judges regardless of their truth or falsity, when those criticisms are concerning past matters not at the time pending in the Courts. This law is based upon sound principle. Every branch of the Government needs constructive criticism; when it is such it is wholesome and helpful; no judge I think welcomes it more nor fears it less than the Judge of this Court But it is altogether a different proposition and is unlawful and clearly constitutes a contempt of Court for any litigant or attorney to pass such in the presence of the Court, not in a respectful, but in a contemptuous and slanderous manner concerning matters then pending and later to be disposed of by the Court.

It is obvious upon a reading of this letter that you deliberately designed to improperly influence the Court in these pending matters wherein no disqualification is suggested, and you were very careful to suggest that the Court was not disqualified in certain matters, and it [fol. 30] is the view of the Court that it was your thought and aim to destroy the independence and the very impartiality of the Court as to those matters.

And I have some more things I should like to remind you gentlemen of, your conduct and course as litigant and as an attorney of this Court, in many respects, has been reprehensible. You have filled

your pleadings with scandalous charges against trusted officials of this Court. You have charged that the Referee in Bankruptcy, the attorneys for the petitioning creditors and the Trustee in Bankruptcy entered into a corrupt conspiracy to do many unlawful things all to deprive you, J. L. Walker, of your rights, in this Court. And not only that, but while the jury were deliberating in cause No. 984, and though in charge of the marshal of this Court, you, both of you being a party to it, employed a private detective to follow and shadow them with a view of reporting to you any corrupt conduct on their part; and you, J. L. Walker, after the jury had rendered its verdict of fifty-six thousand dollars against you, you employed this same detective, whose sworn statement I hold in my hand, to follow the foreman of the jury, Mr. E. G. Thomas, an honorable and respected citizen of Tarrant County, stating that you expected him to meet some one and be paid off, in other words, to receive bribe money for his verdict in said cause. And not only that, but you gave this same private detective to understand, that another one of the jurors, an honorable citizen of Parker County, had been improperly approached and influenced as a juror in this case——

Mr. J. L. Walker: Your Honor, pardon me, but I would like to state that J. L. Walker did but what he is in position to prove, and I have it in my pocket now——

[fol. 31] —Mr. Marshal, cause this man to desist.

Mr. J. L. Walker: I beg your pardon I thought I had the right to speak now.

Judge Wilson: No, you hav-n't got a right. Your time to reply is passed.

In view of all this, it is not surprising that you men would deliver this letter to the Court with the utterly false statement in it that this Court had permitted himself to be improperly influenced and whispered to *and whispered to* by interested parties against a litigant in this Court. It is a simple and easy matter to analyze the character of any man who is expecting every other man to act dishonestly and corruptly.

Your whole course, as I say, has been contemptible, not only in this matter, and it is not surprising that you delivered this letter to the Court and is surprising that you did not state more in the letter, and of course you are in contempt, if you are not, you have your remedy, and you, J. L. Walker, I sentence to the Tarrant County jail for thirty days and the payment of a five hundred dollar fine——

Mr. McCormick: I doubt whether your Honor has the authority to assess both fine and imprisonment. The statute says you may punish by "fine or imprisonment." I believe I would suggest that you visit such fine as you see fit, or such imprisonment, but not both.

[fol. 32] Judge Wilson: I assess a punishment of thirty days against each of these respondents.

Mr. Clay Cooke: We ask for an appeal and that bonds be fixed pending appeal in such amount as the Court may see fit to fix.

Judge Wilson: Your appeal of course will be granted, and the bond fixed at $1,000.00.

Mr. McCormick: An appeal does not line in such a case. The

evidence, gentlemen, if at all, must be reviewed by writ of error, if reviewed at all.

Mr. Clay Cooke: The statement of the Court is he will consider a writ of error or appeal. In this case we will have sixty days——

Judge Wilson: Take these respondents to jail, Mr. Marshal.

Mr. McCormick: If they are going to take the full sixty days on the matter——

Judge Wilson: No, there is not going to be any sixty days, the higher Court is going to pass upon this matter at once.

Mr. Clay Cooke: We want to make bond.

[fol. 33] Mr. McCormick: Has your Honor fixed the writ of error bond yet?

Judge Wilson: That is what I intended to fix the bond at a thousand dollars. I have not allowed any personal bond.

Mr. Dedmon: Did your Honor fix the amount of the bond?

Judge Wilson: One thousand dollars. I am not allowing them bond, not releasing the defendants. It is a writ of error bond.

Mr. Dedmon: You mean you are not going to let them appeal from the order adjudging them to spend thirty days in jail?

Judge Wilson: If they perfect this appeal, I might release them from jail—show that they are going to appeal it and do it in a hurry.

Mr. Dedmon: Of course they will do that as soon as the necessary papers can be prepared.

Mr. McCormick: The appeal must be taken in ten days in order to operate as a supersedeas.

Judge Wilson: You can see about that later.

Defendants thereafter on the 9th day of March, A. D. 1923, [fol. 34] presented to the Court their answer and motion in arrest of judgment and for a new trial and to reform the findings of fact, filed in said cause under leave of the Court, and same was, on to-wit, the 9th day of March, 1923, presented in open Court to the Honorable James C. Wilson, Judge of said Court, for his action thereon. The Court having received and examined said answer and motion declined to grant same or to make any order thereon, to which action of the Court the defendants duly excepted.

Now, in furtherance of justice, and that right may be done, these respondents and defendants, tender and present the foregoing as their bill of exceptions in this case, to the action of the Court on the several objections therein noted, which bill of exceptions contains all of the evidence heard on the trial of this case and prayed that same and each exception herein stated, may be settled, allowed and signed and sealed by the Court, and made a part of the record; and the same is accordingly done this 10th day of March, A. D. 1923.

James C. Wilson, United States District Judge for the Northern District of Texas, at Fort Worth.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO FILE WRIT OF ERROR PAPERS—Filed March 21, 1923

Whereas, on the 26th day of February, A. D. 1923, while the Respondents in this cause were incarcerated in the County jail at Tarrant County, Texas, P. G. Dedmon and W. H. Slay as an act of friendship toward the Respondents filed in this Court on behalf of Respondents a petition for writ of error, a writ of error bond and assignments of error for and on behalf of each of Respondents, and procured an order of this Honorable Court approving same; and,

Whereas at the time of the preparation and filing of the papers above mentioned the said W. H. Slay and P. G. Dedmon requested the Court to grant Respondents herein the privilege of substituting the papers so filed by them with others later on prepared with greater deliberation and care, either by the Respondent Clay Cooke himself or by an attorney of his own selection; and,

Whereas, since the filing of said papers the said Respondents have been released from jail and have employed an attorney of their own selection, to-wit, J. A. Templeton, Esq., who with the assistance [fol. 36] of Respondent Clay Cooke has prepared petitions, bonds, assignments and the necessary and proper orders herein, in lieu of the proceedings filed by the said W. H. Slay and P. G. Dedmon:

It is, therefore, hereby ordered, adjudged and decreed by the Court that the substituted papers this day tendered shall by the Clerk of this Court be filed in the above entitled and numbered cause as of the 26th day of February, A. D. 1923, in lieu of and as a complete substitute for the proceedings heretofore taken and papers filed on behalf of said respondents, by the said W. H. Slay and P. G. Dedmon.

And it further appearing that J. A. Templeton has been selected by Respondents to represent them herein, it is further ordered, adjudged and decreed by the Court that the said W. H. Slay and P. G. Dedmon be, and they are hereby permitted to withdraw from this cause and it is further ordered that the names of the said W. H. Slay, P. G. Dedmon and Sidney Samuels, or the names of Slay, Simon & Smith and Samuel & Brown heretofore shown on papers filed in this cause as attorneys for Respondents, be, and the same are hereby restricted to the papers heretofore filed by them and that the said J. A. Templeton be and he is hereby recognized, and he is authorized to appear, as attorney of record for said Respondents, in the further prosecution of this Writ of Error.

James C. Wilson, Judge.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

Now comes the Respondent herein, Clay Cooke, and says that on the 26th day of February, A. D. 1923, this Court entered judgment in the above entitled and numbered cause in favor of the Plaintiffs and against said respondent, adjudging him to be in contempt of Court and ordering him confined in the County Jail of Tarrant County, Texas, for thirty days, in which said judgment and proceedings certain errors were committed to the prejudice of said respondent, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a Writ of Error issue in his behalf out of the United States Circuit Court of Appeals for the Fifth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. A. Templeton, Attorney for Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

Now comes the Respondent herein, J. L. Walker, and says that on the 26th day of February, A. D. 1923, this Court entered judgment in the above entitled and numbered cause in favor of the Plaintiffs and against said respondent, adjudging him to be in contempt of Court and ordering him confined in the County Jail of Tarrant County, Texas, for thirty days, in which said judgment and proceedings certain errors were committed to the prejudice of said respondent, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a Writ of Error issue in his behalf out of the United States Circuit Court of Appeals for the Fifth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. A. Templeton, Attorney for Defendant.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRITS OF ERROR

On this the 26 day of February, A. D. 1923, came Clay Cooke and J. L. Walker, and presented to the undersigned Judge of the District Court their Petitions for the allowance of a Writ of Error to said District Court for the United States Circuit Court of Appeals for the Fifth Judicial Circuit for the correction of errors complained of in said petitions, together with assignment of errors intended to be urged by them in support of said Writs of Error, said petitions and assignments of error having theretofore been filed in the above entitled causes in the office of the Clerk of the said District Court in compliance with the rules of the United States Circuit Court of Appeals.

In consideration, it is hereby ordered by the undersigned Judge of the District Court, in pursuance of the prayer of said Petitions for Writs of Error, that said Writs of Error be allowed as prayed for in said petitions, and that said Writs of Error act as supersedeas staying the execution of the judgment and sentence pronounced in said District Court upon the said Clay Cooke and the said J. L. Walker during the pendency of said Writs of Error, and that upon service [fol. 40] of said Writs of Error the said respondents and each of them be admitted to bail upon their entering into a good and sufficient bond in the sum of One Thousand ($1,000) Dollars, conditioned as required by law, with surety to be approved by this Court.

In further consideration whereof, it is also hereby ordered by the said undersigned Judge of the District Court aforesaid that the Clerk of said District Court make return of said two Writs of Error allowed to the said Clay Cooke and the said J. L. Walker by transmitting to the United States Circuit Court of Appeals a single true copy of the record and bill of exceptions and proceedings and all things concerning the same in the above entitled cause, No. 2241, in said District Court, and also assignments of error filed on behalf of said Clay Cooke and on behalf of said J. L. Walker, and the petitions for Writs of Error filed in the above entitled cause by the said Clay Cooke and the said J. L. Walker.

Done this the 26 day of February, A. D. 1923, in the City of Fort Worth, Texas, in the District aforesaid.

James C. Wilson, Judge for District Court of the United States for the Northern District of Texas, Fort Worth Division.

Writ of error and citation omitted from the printed record, the originals thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The Defendant, Clay Cooke, in connection with his petition for Writ of Error in the above styled and numbered cause now makes and assigns the following errors which he avers occurred upon the trial of the cause above styled in the Honorable District Court and upon the proceedings had in said cause, to-wit:

I

The Court erred in issuing an instanter Writ of Attachment for the defendants and having them brought summarily before the Court to show cause upon the charge alleged in said order because the charge, if a contempt at all, was not a direct contempt upon which the Court could without trial commit the defendants to jail and, having directed them in said order to show cause, defendants should have been released from the custody of the Marshal and given an opportunity to show cause why the attachment for contempt should not issue.

II.

The Court erred in hailing defendants before the Bar of said Court upon an instanter Writ of Attachment to show cause why they should not be committed for contempt of Court in the writing [fol. 42] of said letter set forth in said charge and then upon being presented at the bar of said Court in refusing to permit them to show their cause why they should not be committed as shown by the record in said cause, the Court having summarily upon their presentation at the Bar committed them to jail for comtempt of Court without a hearing, without the privilege of consulting counsel and setting up or showing their defenses thereto.

III

The Court erred in refusing defendants the right of counsel and time to consult counsel with respect to said charge brought against them, because same is a right guaranteed by the Constitution and laws of the United States passed in pursuance thereof and defendants could not be legally denied that right and privilege.

IV

The Court erred in refusing to permit defendants leave and opportunity to purge themselves of said contempt, if any was committed, by a full, fair and gentlemanly explanation of their purposes and intentions in writing said letter and in refusing to hear any evidence with respect thereto; that the defendants could have shown

by the following witnesses the following facts which would have and should have completely purged them of any contempt so far as said charge goes:

J. L. Walker, Clay Cooke, W. B. Pinney, a practicing attorney *fo* the Tarrant County Bar, P. G. Dedmon, a practicing attorney of [fol. 43] the Tarrant County Bar and Miss Bonnie L. Porter, stenographer, would have testified that in dictating said letter and in presenting same the said Cooke stated that same would be all that would be necessary to get the said Judge to voluntarily disqualify in said cases; that defendant Clay Cooke felt that J. L. Walker could not get a fair and impartial trial before the said Judge and, while he regretted very much having to take such step, he believed that by a personal private letter, without any publicity and without filing any records in said cause reflecting upon said Judge, he could by reason of previous friendly relations, get the Judge to voluntarily recuse himself in said matters. Said witnesses would further testify that the said Cooke and the said Walker were on the road in a car obtaining affidavits of jurors and others for a new trial in cause No. 984 and were out nearly every day and in the office only a short while and that said letter was written hurriedly and left with Mr. Dedmon to look over as to its wording; Mr. Dedmon having to go to Austin suddenly placed the letter back on Mr. Cooke's desk and Mr. Cooke thereupon believing that same had been carefully read sealed same and marked it personal, and intended mailing same to the said Judge, but Mr. Walker going over to the Court offered to deliver it and was permitted to do so; said witness would further testify that the said Clay Cooke did not go with the said Walker to deliver said letter and was not present when same was delivered and further that said letter was delivered on February 17th, Saturday morning, when Court was not in session in the Judge's Chambers and this testimony will be further verified by the testimony of C. C. Cooper who was with the said Walker at the time said letter was delivered. Said witnesses will further testify that the said Cooke and Walker on the morning of February 16th, when they are charged with de- [fol. 44] livering said letter, were either in Wise County, Texas, or on the road between Tarrant County and Wise County, Texas, in Mr. Walker's automobile and this testimony will be further verified by the testimony of W. L. Carr and other witnesses.

V

The Court erred in refusing to hear the testimony of the above witnesses, which said testimony would have absolutely shown that the charge brought by the Court was not in fact true, because said witnesses would have testified as above shown.

VI

The Court erred in placing in the record the pleadings and charge of the Court in Cause No. 984 wherein it was charged that the said

Judge was biased and prejudiced and in excluding the testimony given in said cause and the exceptions and rulings of the Court thereon, which said testimony and rulings thereon would have shown as follows, to-wit:

That the record in said cause would have shown the following facts beyond any doubt:

1. That both defendants conducted themselves throughout said trial in the most courteous and gentlemanly manner in said Court.

2. That the Court made about fifty errors in the introduction and rejection of testimony against the defendants and in his charge to the jury, many of which were purely arbitrary.

[fol. 45] 3. That the plaintiff proved none of the alligations of his bill in the following particulars:

(a) All of the evidence showed that the defendant Walker did not sign said note as surety or indorser and there was no evidence to the contrary.

(b) All of the evidence showed that the notes were secured by corn belonging to the Walker Grain Company and there was no evidence to the contrary.

(c) The evidence showed that the said J. L. Walker pending the appeal after bankruptcy had paid all the legitimate debts of the bankrupt estate and there were no legitimate claims against said estate.

(d) There was no evidence of insolvency on the date said alleged preferential payments were made; on the contrary, the evidence showed that every debt existing at said time had been paid.

4. The evidence showed that the Court charged the jury contrary to all the evidence in the following particulars:

(a) That the said notes were not secured.

(b) That the said Walker was a general creditor.

(c) That the said Walker was personally liable on said notes, and numerous other errors in said charge.

The record in said cause further showed that it was within the knowledge of the Court that in 1918 in charging the jury to find the Walker Grain Company a bankrupt the Court used the following language:

[fol. 46] "According to my view it will not even be necessary to instruct you to find a verdict upon the different issues presented, but merely to find a general verdict. And evidence, though it might not in other phases be supported, it would nevertheless be a proper verdict in this case.

After I reached a conclusion as to what was right in this case, where justice was in the matter, I would say that it has been a very

difficult task for me to restrain myself from comments that may have been violent. I withheld scrupulously any judgment about this matter, despite many things that I had heard about it—I have recently rendered a judgment in favor of the respondent in this Court on matters that came before me as a chancellor of the Court.

I thought these judgments I rendered were right, but when the evidence disclosed the real facts in this case, I express myself mildly when I say that I was astonished that an institution—institutions, had been permitted to ply their vocations as I think in a deliberate swindle, as the respondent and his associates have been guilty of in their course of dealing. It is shown in many, many different ways, and most conclusively to my mind. In fact, it is surprising to me that a man could conduct business in the manner in which this respondent's business has been conducted and these associate corporations, without getting into something more serious than mere litigation. For any institution—business institution to conduct its business on the theory that it shall honor an obligation where there is money in it and repudiate it where there is no money in it, makes such institutions an absolute menace.

I think the undisputed evidence shows it was insolvent on the 16th day of August, and that it committed many acts of bankruptcy and within the period of four months prior to that date. I think the [fol. 47] whole course of dealing was a shocking outrage—it ought to be to any honest man—the whole proceedings of the concerns. Of course I don't suppose the-re petitioning creditors can ever get any money, that they made insolvent as a result of these fraudulent dealings and fraudulent course. In fact, it all shows a conspiracy on the part of these people to defraud anybody that they might come in contact with, provided they became entangled with a contract that meant to them the loss of money."

V

The statement of the Court in the above quoted paragraph in which he states:

"I withheld scrupulously any judgment about this matter, despite many things I had heard about it,"

displayed that the said Court had heard of said matters outside of the Court room and his personal bias and prejudice was created thereby, because there is not a scintilla of evidence in the record in said cause to justify the remarks following said above last quoted sentence.

That the above assertion is not supported by evidence introduced in the Court over which the said James C. Wilson presides. That said above quoted statement could not be based upon anything else except slanders coming to the knowledge of the said Judge outside of the Court, and are without foundation in the evidence introduced in said cause. On the contrary, said statement by the Judge is disputed by the evidence in his Court.

[fol. 48] That said statement of the Court was explained by him on the motion for a new trial in cause No. 984 as follows, to-wit:

The Court: Also there is a statement that I wish to refer to, and it is a quotation from a statement I made on the occasion of instructing a verdict against this present defendant in the adjudication in the bankruptcy trial, and particularly to that part of my statement which is as follows, and which is quoted in this disqualifying affidavit:

"I withheld scrupulously any judgment about this matter despite many things I had heard about it."

I wish to say that statement that I made at that time was entirely correct, both as to scrupulously withholding the judgment and also despite the many things I had heard about it. I had heard many things, so many things that I sometimes questioned myself whether I was qualified to try this case or not, but at the same time I knew there was in no sense any personal prejudice or bias.

While assistant county attorney of Tarrant County in 1912 and part of 1913, I was assigned by the county attorney, Mr. Baskin, to investigate and prosecute this defendant for some alleged crime, either arson or swindling——

Mr. Walker: Give me a chance to explain that——

The Court: I am going to explain it for you.

[fol. 49] Mr. Walker: You can't, you are not familiar with the facts.

The Court: I got familiar enough with them. Never mind. I looked into the matter. Went out to this defendant's place of business and thoroughly investigated that matter and reached the conclusion that the evidence that the state could get was not legally sufficient, and advised the county attorney that the matter that I investigated should not be prosecuted. But there were certain impressions that I gathered from that investigation. Later in the latter part of 1913 I was appointed United States District Attorney, the place I held for nearly four years, and I could hardly say but frequently, but several times during my service in that office, which ended in 1917, charges against this defendant for using the mails to defraud were brought to me for consideration, and every time were investigated. In reaching the conclusion each time as I recall that, the evidence in my judgment was not sufficient to warrant a prosecution, but each succeeding investigation left a few more ideas in my mind and it is such information that I had in that way and had had for years, for that matter, concerning the character of Mr. Walker's transaction and the nature of his business, and I was referring to that in that statement.

Do you care to ask any questions about that.

Mr. Cooke: Were these cases brought principally by—that is brought to the attention by members of the Texas Grain Dealers' Association?

A. I cannot tell you about that, I do not remember.

[fol. 50] Q. Or Jules Smith of the Fort Worth Elevators Company—they were brought were they not by competitors of Mr. Walker in business, to the attention of you?

A. Necessarily my recollection would not be worth much about

that. My impression is they were brought to me by the post office inspector.

Q. You don't know who brought them to the attention of the post office inspector?

A. No, sir, but I have just told you each time I reached the conclusion that they did not warrant a prosecution.

Q. The various matters brought to your mind gave you such ideas about the conduct of his business as you have expressed in that statement?

A. Yes, sir.

Q. Have you ever heard any evidence in this Court in any of these trials or any sworn testimony that would give you the idea that those statements were true——

A. Yes, I would not have made it if the evidence had not have warranted it.

Q. What witness, if Your Honor please?

A. Oh, well, now, that is perfectly ridiculous. The record composes a volume and the higher Court approved the action of the Court in instructing that verdict, and went much further than this Court did, not in the denunciation, but in holding on the questions of law the higher Court surprised me and went further than I did.

Q. The questions of fact were submitted to Your Honor?

A. Yes, and the higher Court approved of it."

All of which showed that the statements in said letter were true.

[fol. 51]

VII

The Court erred in peremptorily and without warrant of commitment confining defendants in jail and holding them without the right of communication with counsel or friends until a Writ of Error was perfected by friends who had to perfect same without consultation with defendants and without knowledge of the facts and circumstances involved in said cause. And the action of the Court in refusing to permit defendants jail liberties, the right to telephone and in confining them in a cell with common criminals.

VIII

The Court erred in charging defendants with the offense of writing said letter set forth in said charge and then punishing them and sentencing them for other and different offences as shown by the record in said cause, to-wit, the offence of writing said letter being set forth fully in said charge, the Court in sentencing defendants for same charged them with the following distinct offences, to-wit:

1. Putting scandalous matter in their pleadings, as shown by the sentence of the Court, and in refusing to permit defendants to reply thereto or introduce any evidence thereon, when in fact said charge was without foundation in that no such matter as alleged by the Court had been included in any pleading filed by defendants and the pleadings ordered attached to said record so show and de-

fendants, if permitted, could have proven each and every allegation of fact set forth in said pleadings and did prove the allegation of fact with regard to the Trustee, W. W. Wilkinson in said case.

[fol. 52] 2. In sentencing defendant for the alleged offence of employing a private detective to shadow one member of said jury, to-wit, E. C. Thomas, and in alleging that the said jury was in charge of a United States Marshal when said charge was unfounded in that said jury was not in charge of a United States Marshal but was permitted to separate during their deliberations and during the trial and go to their respective homes and, further, because defendants could have proved that during said trial the said E. C. Thomas had endeavored to sell to defendants a worthless promissory note and had otherwise acted so as to arouse in defendants a reasonable suspicion as to his actions as shown by the affidavits attached to their answer herein.

3. And it was apparent that the said Court charged defendants with one offense and sentenced them upon two other and different offences and gave them no trial upon any of said charges.

IX

The Court erred in charging defendants with having written said letter for the purpose of influencing the action of the Court upon certain matters then pending in Court, because said letter could have no such purpose or object in that the defendants had the right to file disqualifying affidavits in all of said matters, which they did do immediately upon their release from jail and they had the right to set up said disqualification of said Judge as grounds for a new trial in said cause No. 984, the only matter then pending before said Court, and they did so and, therefore, said letter could not obviously have said purpose and further because the Court had [fol. 53] expressly refused the defendants the right and privilege of explaining their purpose and intention in sending said letter, to-wit, the purpose and intention of relieving counsel and in relieving the Court of that embarrassment which would necessarily follow the filing as a public record of the disqualifying affidavits in order to obtain for the defendant his just rights in the Courts of our country.

X

The Court erred in his findings of fact in said cause and in refusing to reform said findings of fact or to make a record with respect thereto in that the Court found as a fact that he heard and considered the statement made by and on behalf of defendant at the Bar of said Court, because said Court expressly refused and declined to hear the statements made by defendant, Clay Cooke, and by the defendant, J. L. Walker, and expressly refused to permit them to employ counsel or to consult with counsel for the purpose of making their defense and statement therein, all of which is shown by the record herein.

XI

The Court erred in its findings of fact and in refusing on motion to reform said findings of fact and permit a record thereof to be made in the following particular, to-wit:

That the Judge of said Court controlled and directed the trial of said cause No. 984 with impartiality and without prejudice and bias to either party, because defendants respectfully say that the record in said cause will show that the said Judge exhibited great [fol. 54] partiality in said trial both in the introduction of evidence, the ruling upon exceptions, his remarks in the presence of the jury and the charge of the Court, all of which will more fully appear from the record in said cause.

XII

The Court erred in his findings of fact filed by the Court wherein he found that the said J. L. Walker and his attorney of record, Clay Cooke, acting together, were guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice by delivering by the hand of the said J. L. Walker to the Judge of said Court, said James C. Wilson, within a few feet of the Court room and in the Judge's Chambers adjoining said Court room a letter, the said Clay Cooke and J. L. Walker both being present at said time, because if same were the facts and defendants were guilty of contempt, they should have been immediately committed at that time if same was a direct contempt and not ten days later; and, further the court refused to hear the evidence thereon which said evidence would have shown, as shown by the affidavit attached to defendants' answer, that said letter was delivered by the said J. L. Walker on Saturday, February 17, in the Judge's Chambers when Court was not in session, the said J. L. Walker not knowing the contents thereof, same being sealed and marked personal and the only person accompanying the said J. L. Walker at said time was C. C. Cooper and that at said time the said Clay Cooke was in the County Court of Tarrant County, Texas, in the District Clerk's office thereof, being approximately one mile from the Federal Building, wherein said District Court and District Judge's offices were. The evidence would [fol. 55] have further shown as shown by the affidavits attached to defendants' answer and motion to reform said findings of fact or make a record thereon, that defendants were either in Wise County or on the road between Fort Worth and Wise County on the date, February 16th, 1923, when said charge alleges said letter was delivered, same being Friday of said week and in fact said letter was not written until the morning of February 16th and delievered on said morning, same being Saturday, and delivered in the Judge's Chambers before the convening of Court on said date.

XIII

The Court erred in his findings of fact and in refusing to reform same to comport with the actual facts or to permit a record to

be made thereon in the following particulars, to-wit, as set forth in paragraph XVI of defendants' answer and motion to reform same.

XIV

The Court erred in his findings of fact in said cause and in refusing to reform same as prayed for by defendant to comport to the fact or to take evidence and make record thereon in the following particulars, as set forth in defendant's motion to reform same and the affidavits attached thereto.

XV

The Court erred in refusing to arrest the judgment in said cause and to grant defendant a new trial therein as shown by their answer or to set aside and dismiss said charge against them as prayed for in said answer and motion, because said motion was good and sufficient therefor in the following particulars, to-wit:

[fol. 56] 1. Defendants were not present in Fort Worth, Tarrant County, on the date they are alleged to have delivered said letter.

2. Said letter was delivered in the Judge's Chambers when Court was not in session and only the defendant J. L. Walker was present and the said Cook was not present, and the defendant J. L. Walker knew nothing of the contents of said letter.

3. Said letter was intended as a friendly personal letter from the Counsel to said Judge between whom relations have heretofore been friendly and for the purpose of relieving Counsel and said Court of the embarrassment of filing the necessary disqualifying affidavits, the time within which such affidavits would necessarily have to be filed being very short, said letter being written under great stress of circumstances and while defendants were busy obtaining evidence for a new trial in said Cause 984 wherein a $56,000.00 judgment had been rendered against the said J. L. Walker and said letter was written hurriedly and defendant depended upon others, to-wit, P. C. Dedmon to read said letter as to its verbiage, and said defendants made and were willing to make a full, fair and gentlemanly explanation of their purposes, which said explanation should have been accepted by the Court.

XVI

The Court erred in permitting to be filed, approved and allowed, a petition for writ of error in said cause by Counsel not employed by the defendant and not authorized by him to file same when the said Court had defendants confined without the right of communi-
[fol. 57] cation or consultation with Counsel. Because defendants had the right to a motion for a new trial, a right to be heard upon said charge, and a right to employ and consult with counsel prior to being thrown into the Upper Court without any proper record and without any proper defense filed or considered in said cause.

XVII

The Court erred in placing upon defendants a cruel, harsh and unusual punishment, same being neither necessary or proper to protect the dignity of said Court and respect therefor on the part of the defendants and said letter was a private personal letter and same did not contain, or at least was not intended to contain any insulting matter. And further, because the record of said Court shows that said defendant was sentenced for other and different charges and in a fit of extreme anger by said Judge; and said sentence was not inflicted after fair and judicial deliberation upon said charges nor investigation thereof, and was not inflicted in a manner in which a Court is supposed to sentence offenders.

XVIII

The Court erred in denying to defendants their constitutional rights and privileges in the following particulars, to-wit:

1. In denying to them that due process of law without which their liberties could not be taken from them.

2. In denying to them the rights of counsel or to consult counsel.

[fol. 58] 3. In denying to them a fair and impartial hearing.

4. In imposing sentence in an angry and unjudicial frame of mind whereby said Court imposed a harsh, cruel, and unusual punishment in view of the offense charged.

5. In denying to them their rights and privileges of appeal as guaranteed by the laws of Congress by confining them in jail without the right of communication or without the right of consulation with attorneys and in refusing them jail liberties, the right to telephone and other rights whereby they might have and could have perfected their appeal in a systematic and orderly manner and in approving the writ of error and the writ of error bond not signed by defendants and filed without consultation with them and thereby impelling them out of said Lower Court into said Upper Court without any proper record or without any of the rights guaranteed to them by the Constitution and laws of the United States of America.

XIX

The Court erred in h lding that the writing of said letter and delivery of same was a direct contempt upon which defendants were entitled to no trial and no hearing and for which he could have committed them immediately upon the writing of said letter and the delivery thereof, because if same was a direct contempt the Court had waived same by waiting ten days to bring such charges and same was then only an indirect contempt, if a contempt at all, and because the record of said Court shows that the Court punished [fol. 59] defendants for other and different offenses, to-wit, the

shadowing of the Juror, because said charges were brought immediately after the Court obtained evidence of the shadowing of said Juror and not upon the writing of said letter and because the Court shows in its sentence that it is the offense of shadowing said Juror for which the defendants are punished and all of the evidence shows that this was the offense in the mind of the Court in assessing said punishment.

XX

The proceedings in their entirety from beginning to end are null and void in law, unconstitutional, and without any force and effect as a legal and valid judgment, sentence or decree, and should have been upon the Court's own motion set aside, annulled, and held for naught, and should be in this Court set aside, annulled, and held for naught; and the plea of not guilty should have been accepted, and judgment rendered accordingly upon the undisputed facts.

XXI

The said judgment, sentence, and the proceedings to effect same are in violation of Art VI, of the Bill of Rights, of the Constitution of the United States of America, as amended, which reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the [fol. 60] witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

In that (a) Defendant was denied the right of a public trial; (b) Defendant was not informed of the nature of the charge against him prior to the reading of same in Court; (c) Defendant was confronted with no witnesses against him; (d) Defendant was denied process for obtaining witnesses in his favor; (e) Defendant was denied the assistance of counsel for his defense.

XXII

That said sentence imposed is in violation of Art. VIII of the Bill of Rights, which reads as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In that the punishment inflicted is cruel and unusual, was not necessary nor just, was not in proportion to the offense charged, nor calculated to maintain nor protect the dignity of the Court imposing same.

XXIII

Defendants say that said sentence is violative of Art. III of the Constitution in that they are denied the right of trial by jury; and said sentence was not imposed according to the due process of the law of the land.

Wherefore, defendant prays that said judgment, sentence and decree be in all things reversed, and that such other and further [fol. 61] proceedings be herein had and relief be herein granted, as it may be in accordance with the usuages and principles of our law.

J. A. Templeton, Atty. for Defendants.

In United States District Court

[Title omitted]

Assignments of Error

The Defendant, J. L. Walker, in connection with his Petition for Writ of Error in the above styled and numbered cause now makes and assigns the following errors which he avers occurred upon the trial of the cause above styled in the Honorable District Court and upon the proceedings had in said cause, to-wit:

I

The Court erred in issuing an instanter Writ of Attachment for the defendants and having them brought summarily before the Court to show cause upon the charge alleged in said order because the charge, if a contempt at all, was not a direct contempt upon which the Court could without trial commit the defendants to jail and, having directed them in said order to show cause, defendants should have been released from the custody of the Marshal and given an opportunity to show cause why the attachment for contempt should not issue.

[fol. 62] II

The Court erred in hailing defendants before the Bar of said Court upon an instanter Writ of Attachment to show cause why they should not be committed for contempt of Court in the writing of said letter set forth in said charge and then upon being presented at the bar of said Court in refusing to permit them to show their cause why they should not be committed as shown by the record in said cause, the Court having summarily upon their presentation at the Bar committed them to jail for contempt of Court without a hearing, without the privilege of consulting counsel and setting up or showing their defenses thereto.

III

The Court erred in refusing defendants the right of counsel and time to consult counsel with respect to said charge brought against them, because same is a right guaranteed by the Constitution and laws of the United States passed in pursuance thereof and defendants could not be legally denied that right and privilege.

IV

The Court erred in refusing to permit defendants leave and opportunity to purge themselves of said contempt, if any was committed, by a full, fair and gentlemanly explanation of their purposes and intentions in writing said letter and in refusing to hear any evidence with respect thereto; that the defendants could have shown by the [fol. 63] following witnesses the following facts which would have and should have completely purged them of any contempt so far as said charge goes.

J. L. Walker, Clay Cooke, W. B. Pinney, a practicing attorney of the Tarrant County Bar, P. G. Dedmon, a practicing attorney of the Tarrant County Bar and Miss Bonnie L. Porter, stenographer, would have testified that in dictating said letter and in presenting same the said Cooke stated that same would be all that would be necessary to get the said Judge to voluntarily disqualify in said cases; that defendant Clay Cooke felt that J. L. Walker could not get a fair and impartial trial before the said Judge, and, while he regretted very much having to take such step, he believed that by a personal private letter, without any publicity and without filing any records in said cause reflecting upon said Judge, he could, by reason of previous friendly relations, get the Judge to voluntary recuse himself in said matters. Said witnesses would further testify that the said Cooke and the said Walker were on the road in a car obtaining affidavits of jurors and others for a new trial in cause No. 984 and were out nearly every day and in the office only a short while and that said letter was written hurriedly and left with Mr. Dedmon to look over as to its wording; Mr. Dedmon having to go to Austin suddenly placed the letter back on Mr. Cooke's desk and Mr. Cooke thereupon believing that same had been carefully read, sealed same and marked it personal and intended mailing same to the said Judge, but Mr. Walker going over to the Court offered to deliver it and was permitted to do so; said witnesses would further testify that the said Clay Cooke did not go with the said Walker to deliver said letter and was not present when same was delivered and further that said letter [fol. 64] was delivered on February 17th, Saturday morning, when Court was not in session in the Judge's Chambers and this testimony will be further verified by the testimony of C. C. Cooper who was with the said Walker at the time said letter was delivered. Said witnesses will further testify that the said Cooke and Walker on the morning of February 16th, when they are charged with delivering said letter, were either in Wise County, Texas, or on the road be-

tween Tarrant County and Wise County, Texas, in Mr. Walker's automobile and this testimony will be further verified by the testimony of W. L. Carr and other witnesses.

V

The Court erred in refusing to hear the testimony of the above witnesses, which said testimony would have absolutely shown that the charge brought by the Court was not in fact true, because said witnesses would have testified as above shown.

VI

The Court erred in placing in the record the pleadings and charge of the Court in Cause No. 984 wherein it was charged that the said Judge was biased and prejudiced and in excluding the testimony given in said cause and the exceptions and rulings of the Court thereon, which said testimony and rulings thereon would have shown as follows, to-wit:

That the record in said cause would have shown the following facts beyond any doubt:

[fol. 65] 1. That both defendants conducted themselves throughout said trial in the most courteous and gentlemanly manner in said Court.

2. That the Court made about fifty errors in the introduction and rejection of testimony against the defendants and in his charge to the Jury, many of which were purely arbitrary.

3. That the plaintiff proved none of the allegations of his bill in the following particulars:

(a) All of the evidence showed that the defendant Walker did not sign said note as surety or indorser and there was no evidence to the contrary.

(b) All of the evidence showed that the notes were secured by corn belonging to the Walker Grain Company and there was no evidence to the contrary.

(c) The evidence showed that the said J. L. Walker pending the appeal after bankruptcy had paid all the legitimate debts of the bankrupt estate and there were no legitimate claims against said estate.

(d) There was no evidence of insolvency on the date said alleged preferential payments were made; on the contrary, the evidence showed that every debt existing at said time had been paid.

4. The evidence showed that the Court charged the jury contrary to all the evidence in the following particulars:

(a) That the said notes were not secured.

[fol. 66] (b) That the said Walker was a general creditor.

(c) That the said Walker was personally liable on said notes, and numerous other errors in said charge.

The record in said cause further showed that it was within the knowledge of the Court that in 1918 in charging the jury to find the Walker Grain Company a bankrupt the Court used the following language:

"According to my view it will not even be necesary to instruct you to find a verdict upon the different issues presented, but merely to find a general verdict. And evidence, though it might not in other phases be supported, it would nevertheless be a proper verdict in this case.

After I reached a conclusion as to what was right in this case, where justice was in the matter, I would say that it has been a very difficult task for me to restrain myself from comments that may have been violent. I withheld scrupulously any judgment about this matter, despite many things that I had heard about it—I have recently rendered a judgment in favor of the respondent in this Court on matters that came before me as a Chancellor of the Court.

I thought these judgments I rendered were right, but when the evidence disclosed the real facts in this case, I express myself mildly when I say that I was astonished that an institution—institutions, had been permitted to ply their vocations as I think in a deliberate swindle, as the respondent and his associates have been guilty of in their course of dealing. It is shown in many, many different ways, and most conclusively, to my mind. In fact, it is surprising to me that a man could conduct business in the manner in which [fol. 67] this respondent's business has been conducted and these associate corporations, without getting into something more serious than mere litigation. For any institution—business institution to conduct its business on the theory that it shall honor an obligation where there is money in it, and repudiate it where there is no money in it, makes such institutions an absolute menace.

I think the undisputed evidence shows it was insolvent on the 16th day of August, and that it committed many acts of bankruptcy and within the period of four months prior to that date. I think the whole course of dealing was a shocking outrage—it ought to be to any honest man—the whole proceedings of the concerns. Of course, I don't suppose there petitioning creditors can ever get any money, that they — made insolvent as a result of these fraudulent dealings and fraudulent course. In fact, it all shows a conspiracy on the part of these people to defraud anybody that they might come in contact with, provided they became entangled with a contract that meant to them the loss of money."

V

The statement of the Court in the above quoted paragraph in which he states:

"I withheld scrupulously any judgment about this matter, despite many things I had heard about it,"

displayed that the said Court had heard of said matters outside of the Court room and his personal bias and prejudice was created thereby, because there is not a scintilla of evidence in the record in said cause to justify the remarks following said above last quoted sentence.

[fol. 68] That the above assertion is not supported by evidence introduced in the Court over which the said James C. Wilson presides. That said above quoted statement could not be based upon anything else except slanders coming to the knowledge of the said Judge outside of the Court, and are without foundation in the evidence introduced in said cause. On the contrary, said statement by the Judge is disputed by the evidence in his Court.

That said statement of the Court was explained by him on the motion for a new trial in cause No. 984 as follows, to-wit:

The Court: Also there is a statement that I wish to refer to, and it is a quotation from a statement I made on the occasion of instructing a verdict against this present defendant in the adjudication in the bankruptcy trial, and particularly to that part of my statement which is as follows, and which is quoted in this disqualifying affidavit:

"I withheld scrupulously any judgment about this matter despite many things I had heard about it."

I wish to say that statement that I made at that time was entirely correct, both as to scrupulously withholding the judgment and also despite the many things I had heard about it. I had heard many things, so many things that I sometimes questioned myself whether I was qualified to try this case or not, but at the same time I knew there was in no sense any personal prejudice or bias.

While assistant county attorney of Tarrant County in 1912 and part of 1913, I was assigned by the county attorney, Mr. Baskin, [fol. 69] to investigate and prosecute this defendant for some alleged crime, either arson or swinding——

Mr. Walker: Give me a chance to explain that——

The Court: I am going to explain it for you.

Mr. Walker: You can't, you are not familiar with the facts.

The Court: I got familiar enough with them. Never mind. I looked into the matter. Went out to this defendant's place of business and thoroughly investigated that matter and reached the conclusion that the evidence that the state could get was not legally sufficient, and advised the county attorney that the matter that I investigated should not be prosecuted. But there were certain impressions that I gatered from that investigation. Later in the latter part of 1913 I was appointed United States District Attorney, the place I held for nearly four years, and I could hardly say but frequently, but several times during my service in that office, which ended in 1917, charges against this defendant for using the mails to defraud were brought to me for consideration, and every time were investigated. In reaching the conclusion each time as I recall that, the evidence in my judgment was not sufficient to warrant a

prosecution, but each succeeding investigation left a few more ideas in my mind and it is such information that I had in that way and had had for years, for that matter, concerning the character of [fol. 70] Mr. Walker's transaction and the nature of his business, and I was referring to that in that statement.

Do you care to ask any questions about that?

Mr. Cooke: Were these cases brought principally by—that is brought to the attention by members of the Texas Grain Dealers' Association?

A. I cannot tell you about that, I do not remember.

Q. Or Jules Smith of the Fort Worth Elevators Company—they were brought, were they not, by competitors of Mr. Walker in business, to the attention of you?

A. Necessarily my recollection would not be worth much about that. My impression is they were brought to me by the post office inspector.

Q. You don't know who brought them to the attention of the post office inspector?

A. No, sir, but I have just told you each time I reached the conclusion that they did not warrant a prosecution.

Q. The various matters brought to your mind gave you such ideas about the conduct of his business as you have expressed in that statement?

A. Yes, sir.

Q. Have you ever heard any evidence in this Court in any of these trials or any sworn testimony that would give you the idea that those statements were true—

A. Yes, I would not have made it if the evidence had not have warranted it.

Q. What witness, if Your Honor please?

A. Oh, well, now, that is perfectly ridiculous. The record composes a volume and the higher Court approved the action of the Court in instructing that verdict, and went much further than this [fol. 71] Court did, not in the denunciation, but in holding on the questions of law the higher Court surprised me and went further than I did.

Q. The questions of fact were submitted to Your Honor?

A. Yes, and the higher Court approved of it."

All of which showed that the statements in said letter were true.

VII

The Court erred in peremptorily and without warrant of commitment confining defendants in jail and holding them without the right of communication with counsel or friends until a Writ of Error was perfected by friends who had to perfect same without consultation with defendants and without knowledge of the facts and circumstances involved in said cause. And the action of the Court in refusing to permit defendants jail liberties, the right to telephone and in confining them in a cell with common criminals.

VIII

The Court erred in charging defendants with the offense of writing said letter set forth in said charge and then punishing them and sentencing them for other and different offenses as shown by the record in said cause, to-wit, the offense of writing said letter being set forth fully in said charge, the Court in sentencing defendants for same charged them with the following distinct offenses, to-wit:

1. Puttting scandalous matter in their pleadings, as shown by the sentence of the Court, and in refusing to permit defendants to reply [fol. 72] thereto or introduce any evidence thereon, when in fact said charge was without foundation in that no such matter as alleged by the Court had been included in any pleadings filed by defendants and the pleadings ordered attached to said record to so show and defendants, if permitted, could have proved each and every allegation of fact set forth in said pleading and did prove the allegations of fact with regard to the Trustee, W. W. Wilkinson, in said case.

2. In sentencing defendants for the alleged offense of employing a private detective to shadow one member of said jury, to-wit, E. C. Thomas, and in alleging that the said jury was in charge of a United States Marshal when said charge was unfounded in that said jury was not in charge of a United States Marshal but was permitted to separate during their deliberations and during the trial and go to their respective homes and, further, because defendants could have proved that during said trial the said E. C. Thomas had endeavored to sell to defendants a worthless promissory note and had otherwise acted so as to arouse in defendants a reasonable suspicion as to his actions as shown by the affidavits attached to their answer herein.

3. And it was apparent that the said Court charged defendants with one offense and sentenced them upon two other and different offenses and gave them no trial upon any of said charges.

IX

The Court erred in charging defendants with having written said letter for the purpose of influencing the action of the Court upon certain matters then pending in Court, because said letter could have [fol. 73] no such purpose or object in that the defendants had the right to file disqualifying affidavits in all of said matters, which they did do immediately upon their release from jail and they had the right to set up said disqualification of said Judge as grounds for a new trial in said cause No. 984, the only matter then pending before said Court, and they did do so and, therefore, said letter could not obviously had said purpose and further because the Court had expressly refused the defendants the right and privilege of explaining their purpose and intention in sending said letter, to-wit, the purpose and intention of relieving counsel and in relieving the Court of that embarrassment which would necessarily follow the filing as a public record of the disqualifying affidavits in order to obtain for the defendant his just rights in the Courts of our country.

X

The Court erred in his findings of fact in said cause and in refusing to reform said findings of fact or to make a record with respect thereto in that the Court found as a fact that he heard and considered the statement made by and on behalf of defendant at the Bar of said Court, because said Court expressly refused and declined to hear the statements made by defendant, Clay Cooke, and by the defendant, J. L. Walker, and expressly refused to permit them to employ counsel or to consult with counsel for the purpose of making their defense and statement therein, all of which is shown by the record herein.

XI

The Court erred in its findings of fact and in refusing on motion [fol. 74] to reform said findings of fact and permit a record thereof to be made in the following particular, to-wit:

That the Judge of said Court controlled and directed the trial of said cause No. 984 with impartiality and without prejudice and bias to either party, because defendants respectfully say that the record in said cause will show that the said Judge exhibited great partiality in said trial both in the introduction of evidence, the ruling upon exceptions, his remarks in the presence of the jury and the charge of the Court, all of which will more fully appear from the record in said cause.

XII

The Court erred in his findings of fact filed by the Court wherein he found that the said J. L. Walker and his attorney of record, Clay Cooke, acting together, were guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice by delivering by the hand of the said J. L. Walker to the Judge of said Court, said James C. Wilson, within a few feet of the Court room and in the Judge's Chambers adjoining said Court room a letter, the said Clay Cooke and J. L. Walker both being present at said time, because if same were the facts and defendants were guilty of contempt, they should have been immediately committed at that time if same was a direct contempt and not ten days later; and, further, the Court refused to hear the evidence thereon which said evidence would have shown, as shown by the affidavits attached to defendants' answer, that said letter was delivered by the said J. L. Walker on Saturday, February 17th, in the Judge's Chambers when Court was not in session, the said J. L. Walker not knowing the [fol. 75] contents thereof, same being sealed and marked personal and the only person accompanying the said J. L. Walker at said time was C. C. Cooper and that at said time the said Clay Cooke was in the County Court of Tarrant County, Texas, in the District Clerk's office thereof, being approximately one mile from the Federal Building, wherein said District Court and District Judge's office were. The evidence would have further shown as shown by the affidavits attached to defendants' answer and motion to reform said findings of

fact or make a record thereon, that defendants were either in Wise County or on the road between Fort Worth and Wise County on the date, February 16th, 1923, when said charge alleges said letter was delivered, same being Friday of said week and in fact said letter was not written until the morning of February 17th and delivered on said morning, same being Saturday, and delivered in the Judge's Chambers before the convening of Court on said date.

XIII

The Court erred in his findings of fact and in refusing to reform same to comport with the actual facts or to permit a record to be made thereon in the following particulars, to-wit, as set forth in paragraph XVI of defendants' answer and motion to reform same.

XIV

The Court erred in his findings of fact in said cause and in refusing to reform same as prayed for by defendant to comport to the fact or to take evidence and make record thereon in the following particulars, as set forth in defendants' motion to reform same and the affidavits attached thereto.

[fol. 76]) XV

The Court erred in refusing to arrest the judgment in said cause and to grant defendant a new trial therein as shown by their answer or to set aside and dismiss said charge against them as prayed for in said answer and motion, because said motion was good and sufficient therefor in the following particulars, to-wit:

1. Defendants were not present in Fort Worth, Tarrant County, on the date they are alleged to have delivered said letter.

2. Said letter was delivered in the Judge's Chambers when Court was not in session and only the defendant, J. L. Walker, was present and the said Cook was not present, and the defendant, J. L. Walker, knew nothing of the contents of said letter.

3. Said letter was intended as a friendly personal letter from the Counsel to said Judge between whom relations have hertofore been friendly and for the purpose of relieving Counsel and said Court of the embarrassment of filing the necessary disqualifying affidavits, the time within which such affidavits would necessarily have to be filed being very short, said letter being written under great stress of circumstances and while defendants were busy obtaining evidence for a new trial in said Cause 984, wherein a $56,000.00 judgment had been rendered against the said J. L. Walker and said letter was written hurriedly and defendant depended upon others, to-wit, P. C. Dedmon to read said letter as to its verbiage, and said defendants made and were willing to make a full, fair and gentlemanly explanation of their purposes, which said explanation should have been accepted by the Court.

[fol. 77]

XVI

The Court erred in permitting to be filed, approved and allowed a petition for writ of error in said cause by Counsel not employed by the defendant and not authorized by him to file same when the said Court had defendants confined without the right of communication or consultation with Counsel. Because defendants had the right to a motion for a new trial, a right to be heard upon said charge, and a right to employ and consult with counsel prior to being thrown into the Upper Court without any proper record and without any proper defense filed or considered in said cause.

XVII

The Court erred in placing upon defendants a cruel, harsh and unusual punishment, same being neither necessary or proper to protect the dignity of said Court and respect therefor on the part of the defendants and said letter was a private personal letter and same did not contain, or at least was not intended to contain, any insulting matter. And further, because the record of said Court shows that said defendant was sentenced for other and different charges and in a fit of extreme anger by said Judge; and said sentence was not inflicted after fair and judicial deliberation upon said charges nor investigation thereof, and was not inflicted in a manner in which a Court is supposed to sentence offenders.

XVIII

The Court erred in denying to defendants their constitutional rights and privileges in the following particulars, to-wit:

[fol. 78] 1. In denying to them that due process of law without which their liberties could not be taken from them.

2. In denying to them the rights of counsel or to consult counsel.

3. In denying to them a fair and impartial hearing.

4. In imposing sentence in an angry and unjudicial frame of mind whereby said Court imposed a harsh, cruel and unusual punishment in view of the offense charged.

5. In denying to them their rights and privileges of appeal as guaranteed by the laws of Congress by confining them in jail without the right of communication or without the right of consultation with attorneys and in refusing them jail liberties, the right to telephone and other rights whereby they might have and could have perfected their appeal in a systematic and orderly manner and in approving the writ of error and the writ of error bond not signed by defendants and filed without consultation with them and thereby impelling them out of said Lower Court into said Upper Court without any proper record or without any of the rights guaranteed to them by the Constitution and laws of the United States of America.

XIX

The Court erred in holding that the writing of said letter and delivery of same was a direct contempt upon which defendants were entitled to no trial and no hearing and for which he could have com- [fol. 79] mitted them immediately upon the writing of said letter and the delivery thereof, because if same was a direct contempt the Court had waived same by waiting ten days to bring such charges and same was then only an indirect contempt, if a contempt at all, and because the record of said Court shows that the Court punished defendants for other and different offenses, to-wit, the shadowing of the Jurors, because said charges were brought immediately after the Court obtained evidence of the shadowing of said Juror and not upon the writing of said letter and because the Court shows in its sentence that it is the offense of shadowing said Juror for which the defendants are punished and all of the evidence show that this was the offense in the mind of the Court in assessing said punishment.

XX

The proceedings in their entirety from beginning to end are null and void in law, unconstitutional, and without any force and effect as a legal and valid judgment, sentence or decree, and should have been upon the Court's own motion set aside, annulled, and held for naught, and should be in this Court set aside, annulled, and held for naught; and the plea of not guilty should have been accepted and judgment rendered accordingly upon the undisputed facts.

XXI

The said judgment, sentence, and the proceedings to effect same are in violation of Art. VI, of the Bill of Rights, of the Constitution of the United States of America, as amended, which reads as follows:

[fol. 80] In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

In that (a) Defendant was denied the right of a public trial; (b) Defendant was not informed of the nature of the charge against him prior to the reading of same in Court; (c) Defendant was confronted with no witnesses against him; (d) Defendant was denied process for obtaining witnesses in his favor; (e) Defendant was denied the assistance of counsel for his defense.

XXII

That said sentence imposed is in violation of Art. VIII of the Bill of Rights, which reads as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In that the punishment inflicted is cruel and unusual, was not necessary nor just, was not in proportion to the offense charged, nor calculated to maintain nor protect the dignity of the Court imposing same.

XXIII

Defendants say that said sentence is violative of Art. III of the [fols. 81 & 82] Constitution in that they are denied the right of trial by jury; and said sentence was not imposed according to the due process of the law of the land.

Wherefore, defendant prays that said judgment, sentence and decree be in all things reversed, and that such other and further proceedings be herein had and relief be herein granted, as it may be in accordance with the usages and principles of our law.

J. A. Templeton, Atty. for Deft.

Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fols. 83 & 84] Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fols. 85 & 86] Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fols. 87 & 88] Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fol. 89] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated by and between the parties hereto through their respective attorneys of record, and amicus curiæ—

(1) That although each of the defendants hereto has sued out separate writs of error from the Circuit Court of Appeals for the Fifth Circuit to review the judgment of the District Court of the United States for the Northern District of Texas, in the above entitled cause, there is no necessity for more than one transcript of record to

be prepared and filed as a return to both said writs of error in said Circuit Court of Appeals, and, accordingly, but one transcript of record shall be prepared and filed in said Circuit Court of Appeals as a return to both said writs of error, which transcript of record shall consist of the following:

(a) Order for Attachment.

(b) Writ of attachment and return.

(c) Bill of exceptions.

(d) Order of Commitment or sentence.

(e) ——.

[fol. 90] (f) The petition of the respective parties for writs of error, together with the assignment of errors of the respective parties filed herein.

(g) Order of Court allowing said writs of error.

(h) Bond of defendants.

(i) Writs of error and Citations issued with returns thereon.

And it is further agreed that said single transcript of record so prepared shall serve as a record for both said writs of error in said Circuit Court of Appeals and may be used — each of the partes in said Circuit Court of Appeals in their respective writs of error.

(2) That only one printed record shall be prepared in said Circuit Court of Appeals which shall be entitled in the matter of both said writs of error and that separate briefs on each writ need not be prepared, and that the argument on both said writs of error may be heard by said Circuit Court of Appeals at the same time.

(3) That this stipulation shall also be included in the transcript.

Henry Zweifel, United States Attorney. J. M. McCormick, Amicus curiæ. J. A. Templeton, Attorney for Defendants.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

To the Clerk of said Court:

Now come the defendants in the above styled and numbered cause and file this their notice of the election to take and file in the Appellate Court to be printed under the supervision of its Clerk and under its rules a transcript of the record or of the part thereof requisite to the hearing of the case in that Court.

J. A. Templeton, Attorney for Defendants.

[fol. 92] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Louis C. Maynard, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that the foregoing is a true and correct transcript of the record, assignment of errors and all proceedings in cause No. 2241, wherein the United States of America are plaintiffs and Clay Cooke and J. L. Walker are defendants, as fully as the same now remains on file and of record in my office at Fort Worth, Texas, save and except that the original writ of error and citation in error are included therein in place of copies of same.

Witness my hand officially and the seal of said Court at Fort Worth, Texas, this the 24 day of March, A. D. 1923.

Louis C. Maynard, Clerk, by G. B. Buckley, Deputy. (Seal.)

[fol. 93] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4068

CLAY COOKE and J. L. WALKER, Plaintiffs in Error,

versus

UNITED STATES OF AMERICA, Defendants in Error

PETITION FOR CERTIORARI AND FOR DIMINUTION OF THE RECORD—Filed April 5, 1923

To the Honorable Chief Justice and Associate Justices of said court:

Your Petitioners, Clay Cooke and J. L. Walker, in the above styled and numbered cause, respectfully represent:

I

That they are the Plaintiffs in Error in the above styled and numbered cause and reside in Fort Worth, Tarrant County, Texas, and are resident citizens of said County and State. That the United States of America is a party adversely interested to your Petitioners herein and is the Defendant in Error in this cause. That said United States of America is represented in said cause by her attorneys of record, Henry Zweifel, United States District Attorney for the Northern District of Texas, who resides at Fort Worth, Tarrant County, Texas, and J. M. McCormick, who resides at Dallas in Dallas [fol. 94] County, Texas.

II

That this cause is pending in this Honorable Court on petition for Writ of Error by your Petitioners and the record in said cause has been duly certified by the Clerk of the District Court of the United States for the Northern District of Texas to this Honorable Court and return made upon said Writs of Error and said record filed in this Honorable Court.

III

That upon filing of said petition for Writ of Error aforesaid on behalf of your Petitioners, your Petitioners entered into a stipulation by and through their attorney, Hon. J. A. Templeton, representing your Petitioners, and the said Hon. Henry Zweifel, United States District Attorney aforesaid, and Hon. J. M. McCormick, special prosecutor aforesaid, a true copy of which said stipulation is hereto attached and marked Exhibit "A" and made a part hereof by this reference. That said stipulation provided that the Clerk of said Court might prepare and file in this Honorable Court one transcript of the record in said cause as a return to both said Writs of Error sued out by your petitioners and further provided that said transcript of record shall consist of the following, to-wit:

(a) Order for attachment.

(b) Writ of attachment and return.

(c) Bill of Exceptions.

(d) Order of Commitment, or Sentence.

(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc.

(f) The Petition of the respective parties for Writs of Error, to-
[fol. 95] gether with the assignments of error of the respective parties filed herein.

(g) Order of Court allowing said Writs of Error.

(h) Bond of Defendants.

(i) Writs of Error and Citations issued with returns thereon.

IV

That at the time of the allowance of said Writ of Error, your Petitioners through their said Attorney filed with the Clerk of the District Court of the United States a statement of the part of the record to be included in said transcript after having served a copy thereof upon the said District Attorney and the said J. M. McCormick, which said notice included the same record as set forth in the stipulation above referred to, a copy of which said notice is hereto attached and marked Exhibit "B" and made a part hereof.

V

Your Petitioners further respectfully show that the Clerk of the District Court of the United States for the Northern District of Texas, Fort Worth Division, in violation of said stipulation aforesaid and of the notice and direction aforesaid, wrongfully omitted from the record in said cause, transmitted as a return to said Writs of Error, instruments set forth in said stipulation and notice as follows:

"(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc."

Your Petitioners respectfully show that the Clerk of said Court, after the filing of said stipulation aforesaid, duly signed, erased or permitted to be erased from said stipulation the item marked (e) aforesaid and refused to include same in the record transmitted to this Honorable Court. That your Petitioners are advised by the Clerk of said Court that said item (e) aforesaid was scratched out of [fol. 96] the stipulation and the notice filed with him by his Honor James C. Wilson, Judge of the District Court of the United States for the Northern District of Texas and that the said Clerk omitted same from the record so transmitted upon orders of the said District Judge as aforesaid. That said instrument marked (e) aforesaid was included in said signed stipulation and signed notice when same were filed with the Clerk of the District Court of the United States as aforesaid; that the original now appears on file in his office with a pencil line drawn through said item (e). The Clerk of said Court informed your Petitioners that the Judge of said Court drew said line through said item upon said signed stipulation and notice after it was filed with him and after the filing and allowance of said Writs of Error to this Honorable Court; that said action of said Judge and Clerk, in allowing and permitting the alteration of said stipulation and notice after being signed and filed with said Clerk, as a part of the record in this cause, was done without the knowledge or consent of your Petitioners or their said attorney signing said stipulation and notice. That said answer and motion of defendants for a new trial in arrest of judgment is a necessary part of said record on appeal to this Honorable Court and they are entitled to have same included in said transcript.

Wherefore, Your Petitioners respectfully pray Your Honors to grant unto them a Writ of Certiorari to be directed to the Clerk of the District Court of the United States for the Northern District of Texas commanding him upon the receipt of said Writ to certify to this Honorable Court as a part of the record in said cause the said answer and motion of your Petitioners for new trial and in arrest of judgment so filed in this Court and constituting a part of the record in said cause. And that upon the return of said Writ and record same be and constitute a part of the record in this cause.

(Signed) J. A. Templeton, E. Howard McCaleb, Attorneys for Petitioners.

[fol. 97] Jurat showing the foregoing was duly sworn to by Clay Cooke & J. L. Walker, omitted in printing.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS

AFFIDAVIT OF J. A. TEMPLETON

THE STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority, on this day personally appeared J. A. Templeton, who, being by me first duly sworn, states upon oath: That he is a practising attorney of the Fort Worth, Texas Bar; that the notice and stipulation referred to in the above and foregoing motion were filed by him with the Clerk of the District Court of the United States for the Northern District of Texas, and, at the time of filing same, the item marked (e) thereon was not scratched out of either said stipulation or notice; that same now appears on file with a pencil line drawn through said item; that affiant did not authorize any one to scratch out said item on said stipulation and notice signed and filed by affiant and same was done without his knowledge or consent.

(Signed) J. A. Templeton.

Subscribed and sworn to before me this the 29th day of March, A. D. 1923. (Signed) E. Bordin, Notary Public in and for Tarrant County, Texas. (Seal.)

[fol. 99] EX. A TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

No. 2241

UNITED STATES OF AMERICA

vs.

CLAY COOKE and J. L. WALKER

It is hereby stipulated by and between the parties hereto through their respective attorneys of record,

(1) That although each of the defendants hereto has sued out separate Writs of Error from the Circuit Court of Appeals for the Fifth Circuit to review the judgment of the District Court of the United States for the Northern District of Texas, in the above entitled cause, there is no necessity for more than one transcript of

record to be prepared and filed as a return to both said Writs of Error in said Circuit Court of Appeals and, accordingly, but one transcript of record shall be prepared and filed in said Circuit Court of Appeals as a return to both said Writs of Error, which transcript of record shall consist of the following:

(a) Order for attachment.

(b) Writ of attachment and return.

(c) Bill of Exceptions.

(d) Order of Commitment, or Sentence.

(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc.

(f) The Petition of the respective parties for Writs of Error, to-
[fol. 100] gether with the assignments of error of the respective parties filed herein.

(g) Order of Court allowing said Writs of Error.

(h) Bond of Defendants.

(i) Writs of Error and Citations issued with returns thereon.

And it is further agreed that said single transcript of record so prepared shall serve as a record for both said Writs of Error in said Circuit Court of Appeals and may be used by each of the parties in said Circuit Court of Appeals on their respective Writs of Error.

(2) That only one printed record shall be prepared in said Circuit Court of Appeals which shall be entitled in the matter of both said Writs of Error and that separate briefs on each writ need not be prepared, and that the argument on both said Writs of Error may be heard by said Circuit Court of Appeals at the same time.

(3) That this stipulation shall also be included in the transcript.

(Signed) Henry Zweifel, United States Attorney. (Signed) J. M. McCormick, Special Prosecutor. (Signed) J. A. Templeton, Attorney for Defendants.

STATE OF TEXAS,
County of Tarrant:

I, D. Sheppard, a Notary Public in and for Tarrant County, Texas, hereby certifies that the above and foregoing is a true and correct copy of the original signed instrument from which same was compared by me.

(Seal.) Given under my hand and seal of office this 15th day of March, A. D., 1923.

(Signed) D. Sheppard, Notary Public, Tarrant County, Texas. (Seal.)

[fol. 101] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

No. 2241

UNITED STATES OF AMERICA

vs.

CLAY COOKE and J. L. WALKER

To the Clerk of said Court:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit pursuant to Writs of Error allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to-wit:

(a) Order for attachment.

(b) Writ of attachment and return.

(c) Bill of Exceptions.

(d) Order of Commitment, or Sentence.

(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc.

(f) The Petition of the respective parties for Writs of Error, together with the assignments of error of the respective parties filed herein.

(g) Order of Court allowing said Writs of Error.

(h) Bond of Defendants.

(i) Writs of Error and Citations issued with returns thereon.

(Signed) J. A. Templeton, Attorney for Defendants.

Received a copy of the above and foregoing notice and præcipe.
—— ——, Attorney for the United States of America.

[fol. 102] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR CERTIORARI AND FOR DIMINUTION OF THE RECORD

Upon consideration of the petition of the plaintiffs in error in the above entitled cause for the writ of certiorari for diminution

of the record in said cause, It is ordered that said petition be, and the same is, denied at the cost of the plaintiffs in error.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION

On this day this cause was called, and, after argument by J. A. Templeton, Esq., and Clay Cooke, Esq., for plaintiffs in error, and Joseph Manson McCormick, Esq., for defendant in error, was submitted to the Court.

[fol. 103] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Error to the District Court of the United States for the Northern District of Texas

J. A. Templeton and E. Howard McCaleb, (J. A. Templeton and Clay Cooke, pro se, on the Brief), for Plaintiffs in Error.

Henry Zweifel, United States Attorney, and Joseph Manson McCormick, (Henry Zweifel, United States Attorney and J. M. McCormick, Amicus Curiae, on the Brief), for Defendant in Error.

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

OPINION—Filed December 26th, 1923

GRUBB, District Judge:

This is a writ of error to the District Court for the Northern District of Texas from a judgment and sentence in a contempt proceeding instituted by the United States against plaintiffs in error, hereinafter called defendants. The defendant, Clay Cooke, was an attorney in, and the defendant J. L. Walker was a party to a number of suits and bankruptcy proceedings pending in the District Court. A few days before the alleged contempt was committed, one [fol. 104] of the suits against Walker, in which Cooke was one of his lawyers, had been tried in the District Court, with a jury, and had resulted in a verdict and judgment against Walker for $56,484.65. Notice of a new trial had been given in this case. There were other cases, in which Walker was a party or interested, still pending in the same court. The alleged contempt consisted in the delivery to the Honorable James C. Wilson, who was one of the District Judges of that District, and before whom the case referred to had been tried and before whom the others were pending, of a

letter by the defendants or one of them. The letter was sealed, addressed to the Judge and marked personal. The letter was delivered to the Judge while he was in his chambers at the place of holding the United States District Court in Fort Worth, and while he was engaged in the trial of another jury case and during a recess that occurred during the progress of that trial. Nothing of importance was said by the defendant or defendants, at the time of the delivery of the letter to Judge Wilson. The letter was not read by him in their presence. About ten days after the delivery of the letter, Judge Wilson entered an order on the minutes of the District Court, which recited the delivery of the letter and the attending circumstances; set out the letter; and ordered that an attachment immediately issue for the defendants and that the Marshal produce them instanter before the Court to show cause why they should not be punished for contempt. The Marshal executed the attachment by producing the defendants in open court in response to it. The defendants thereupon asked for time to procure counsel and prepare their defences to the rule to show cause. Objection was made by the attorneys for plaintiff and delay was denied by the District Judge. The District Judge, however, stated [fol. 105] that if defendants, upon being called upon to state their defences, indicated in their response that they had any legal defence, he would grant them time to prepare and plead their defences. The defendant, Cooke, thereupon made a statement as to his connection with the letter. The defendant, Walker, made no statement. He attempted to do so while the District Judge was announcing his decision but was told that the time for him to talk had passed. The defendant, Cooke, however, assumed all responsibility for the contents of the letter and stated that his co-defendant, Walker, was not apprised of the contents of the letter, and only knew that it was an endeavor to induce Judge Wilson to exchange with some other Judge in the matters in which the defendant, Walker, was involved. In his statement Cooke admitted having dictated and signed the letter, and having read it hastily before signing it, and having caused it to be delivered to Judge Wilson through the defendant Walker. There was a conflict between Judge Wilson, Cooke and Walker, as to whether or not Cooke was present with Walker when the letter was delivered. This is unimportant in view of Cooke's admission that he caused the letter to be delivered. The letter is here set out in full except the address and caption.

"Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will consent to Your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having however proceeded to enter judgment in the petition

for review of the action of the Referee on the summary orders against the Farmers & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing [fol. 106] disqualification, which to my mind, as a lawyer and an honest man, is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or Your Honor's qualification having been questioned, to exchange places and permit some Judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just been concluded, I believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effects of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect have been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest possible moment Your Honor's pleasure with respect to the matters herein presented, so that further steps may be avoided.

With very great respect I beg to remain,

Yours most truly, Clay Cooke."

Whether the defendants were properly adjudged to be guilty of criminal contempt depends upon the answers to these questions:— (1) Whether or not the letter contained contemptuous matter; (2) Whether the defendants were entitled, under the law, to a hearing as to their guilt or innocence; and (3) Whether, if so, they, either or both, were accorded such a hearing; or were injured by being denied one.

1. The letter was ostensibly couched in terms of respect, but its substance, and not alone its form, is to be regarded. The defendant, Cooke, stated that his purpose in writing the letter was to avoid the filing of an affidavit disqualifying Judge Wilson, which he felt it his duty to do in the protection of his client's interest. If the purpose of the letter was as stated, there was no impropriety in the mere writing of a letter with that purpose. While the Statute provides a method for disqualifying a judge there could be no wrong [fol. 107] in addressing a judge in a proper way, to secure his voluntary retirement. The propriety of the letter depends upon the

language used by the writer in addressing the judge. Language, appropriate in an affidavit of disqualification, might not be used with propriety in a private letter addressed to the judge. The part relied upon by the plaintiff as constituting the contempt, is the statement that prior to the trial of the recent case of his client, Walker, the writer had believed Judge Wilson big enough and broad enough to overcome the personal prejudice against his client which he knew to exist, but that the trial of that case had convinced him that he had been mistaken in entertaining that belief; that his client had desired but had not obtained the privilege of stating his answers to the slanders that had been filed in Court and whispered in the ears of Judge Wilson against him; that the writer's hopes in this respect had been rudely shattered, and his confidence in Judge Wilson destroyed and he was, for that reason, appealing to the Judge to voluntarily disqualify himself in the other cases of his client. These statements charge the District Judge with having had a personal prejudice again Walker, which had prevented his according Walker a fair trial, in the case that had just been completed; that he had denied Walker the privilege of vindicating himself against slanders, which the Judge had listened to from others in private; and that his prejudice against Walker was such as to prevent his giving Walker justice in future trials. The letter also impliedly threatened Judge Wilson with disqualification proceedings, in the event he refused to recuse himself. At the time of the delivery of the letter, it appears from the recital that Judge Wilson was still to be called upon to hear the motion for a new trial in the case which had just been tried, and also certain bankruptcy proceedings, all of which had proceeded too far for an exchange of judges. The [fol. 108] natural tendency of the letter was to destroy the calm and dispassionate consideration by Judge Wilson of the pending matters, which it was his duty to give. The aim of the law in proceedings for contempt of this nature, is not to protect the judge from criticism, to save him the annoyance of it; but to keep his usefulness unimpaired by matter, which would be likely to affect a judicial and impartial attitude in matters to be decided by him. The question is not whether the letter, in fact, had this effect upon Judge Wilson but whether it was calculated to do so upon any judge, or calculated to create such an impression upon others, and so injure the administration of justice. The test is the harm it is likely to do to the Court and to the Judge as representing the Court, and not the annoyance that it may cause to the Judge as a man. The fact, if it is a fact, that the contents of the letter were not intended by the writer to go beyond Judge Wilson, is unimportant; for, with due respect to the Court over which he presided, Judge Wilson could not have done otherwise than make disclosure himself, though the writer did not. If the tendency of the letter was to injuriously affect the administration of justice, either in actuality or in reputation, it constituted a contempt, which Judge Wilson owed his Court the duty of redressing, aside from personal considerations. That the letter was of this tendency is obvious. The writing and delivery of it was a contempt committed in the presence of the Court within the

meaning of Section 268 of the Judicial Code. The letter was handed to Judge Wilson in his chambers in the building in which Court was then being conducted by him. The fact that it was not delivered to him in the court room, and was delivered during a momentary recess of the court, did not make it the less so. In the case of Savin, Petitioner, 131 U. S. 267, the Supreme Court held that "within the [fol. 109] meaning of Section 725 (now Section 268 Judicial Code) the Court, at least, when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court." If a room used for witnesses sufficed, as in the case cited, a fortiori the chambers of the presiding judge would. The occurrence would have been no more in the presence of the court, if the letter had been handed to Judge Wilson while he was on the bench. A mere temporary recess would not interrupt the session of the court or prevent the Judge from punishing contempts committed in his presence. As the contempt was committed in the presence of the Court, we need not consider whether it was also "so near thereto as to obstruct the administration of justice." Savin, Petitioner, supra, U. S. vs. Huff, 206 Fed. 700. We hold that the delivery of the letter to Judge Wilson constituted a contempt, punishable under the provisions of Section 268 of the Judicial Code.

2. The defendants were entitled to a hearing upon the issue of their guilt or innocence. The contempt, while committed in the presence of the Court, within the meaning of Section 268, was not committed in the face of the Court, so as to give the District Judge the right to inflict immediate punishment without a hearing and even in the absence of the defendant, as in the case of Ex Parte Terry, 131 U. S. 290. In that case, as well as in the case of Savin, Petitioner, supra, the Supreme Court distinguished contempts committed in the face of the Court from those committed in the presence of the Court, the circumstances of which the Judge could not have a perfect knowledge of, and the different procedure to be applied to each class of contempts. For those committed in open court, and of a nature to interrupt its proceedings, and the facts of [fol. 110] which were so open and notorious as to make proof unnecessary, the Supreme Court held that the trial judge had the right to punish the offender without giving him a hearing. For those committed in the presence of the Court but not in open Court and of a nature to interrupt its proceedings, and of the facts of which, the Judge could not have perfect knowledge, the Supreme Court prescribed as the proper procedure a rule to show cause or an attachment and a hearing thereon. In view of the fact that the delivery of the letter did not occur in open court; did not interrupt an actual session of the Court; and that the District Judge could not have had the perfect knowledge of all the facts, incident to an occurrence in open court; we think the District Court adopted the correct procedure in issuing an attachment for the defendants and in giving them an opportunity to be heard before they were condemned.

3. The remaining question is whether the defendants were accorded a hearing by the District Judge. The hearing must, in any event, be a summary one. All that is required is notice to the defendant and a reasonable opportunity to enable him to present his defence. In this case the defendants were put upon their hearing immediately upon being brought into Court under the attachment. They asked for time to secure counsel and witnesses and for preparation, which was denied them. One of the defendants was a lawyer himself and represented his co-defendant and both had the assistance of another lawyer, the partner of the former, who participated in the hearing. The matter of granting further delay was discretionary with the trial Court. The District Judge stated to the defendants that he would allow them time for preparation if they showed that they had legal defences, and he called upon them to state their defences. The defendant, Cooke, as spokesman for himself and his [fol. 111] co-defendant, who was his client, thereupon stated in open court the defensive matter relied upon by himself and his co-defendant. He admitted authorship of the letter and responsibility for its delivery to Judge Wilson in chambers, while denying his personal presence there. The matter that he offered as defensive had no tendency to show his innocence. It was in part a confession of guilt and in part an offer to show extenuation. As to the defendant, Cooke, there was no need for a further hearing. His statement made in open court, in response to the rule, conclusively showed his guilt. Any abruptness in the hearing was not harmful to him for this reason. The District Judge was clothed with discretion with reference to the extent that he would allow proof of extenuation. He was not required to do more, in this respect, than to hear Cooke's own statement in mitigation of his confessed guilt, and this he did. We think the defendant, Cooke, has no ground of complaint for having been denied a more deliberate hearing. With reference to the defendant, Walker, the matter stands differently. Guilt, as to him, was not established by a showing that he delivered the letter to Judge Wilson, either alone or in company with his co-defendant. It was necessary also to show that he had knowledge of the contents of the letter. The inference of knowledge may have been strong but it was not conclusive. There was no admission made by the defendant, Walker, which supplied the need for proof. Cooke was Walker's lawyer and in his statement, he told Judge Wilson that Walker was ignorant of the contents of the letter, further than that it contained a request to Judge Wilson to voluntarily recuse himself. If this was the extent of his knowledge, he was not guilty of contempt in delivering the letter. Cooke may not have had such a hearing as to his guilt as he was entitled to. It was, however, suffi- [fol. 112] cient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him. On the other hand, his co-defendant, Walker, through him, stated a good defence in law to the rule, when called upon to do so by the District Judge. He was not given an opportunity to prove this defence, and was adjudged guilty without having had the chance to deny knowl-

edge of the contents of the letter, at the time of its delivery; or to offer the evidence of other witnesses on this issue. The permission of the Court given him to incorporate his defence in the record could not take the place of a hearing of his defence before the tribunal, before which he was being tried.

The judgment of the District Court is affirmed as to the defendant, Cooke, and reversed as to the defendant Walker, and the cause remanded as to him for further proceedings in conformity with this opinion.

[fols. 113 & 114] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed Dec. 26, 1923

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed as to the plaintiff in error Clay Cooke, and reversed as to the plaintiff in error J. L. Walker; and that this cause as to said plaintiff in error, J. L. Walker, be, and it is hereby remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING AND ORDER OVERRULING SAME

To the Honorable Judges of the Circuit Court of Appeals of the United States, Fifth Circuit:

Plaintiff in error, Clay Cooke, respectfully complains of the decree [fol. 116] and opinion herein rendered, affirming the decree of the District Court of the United States for the Northern District of Texas, sentencing petitioner to thirty days in jail for alleged contempt of court, and respectfully prays for a rehearing of this cause, and that the constitutional questions herein raised be certified to the Supreme Court, and assigns as ground for this application the following, to-wit:

1

There was no legal or lawful charge filed against plaintiff in error, in that:

(a) The purported charge set forth against plaintiff in error is not signed, filed, nor was same entered on any record of said court.

(b) Said purported charge does not allege any offence against the law in that it does not allege that any statement made in the purported letter is false, nor does it allege any facts showing wherein said letter obstructed the administration of justice in said Court.

2

There is no evidence in the record to support the charge, in that:

(a) No evidence whatever was introduced by the Government.

(b) There was and is no evidence that the letter actually written [fol. 117] is as copied in the charge, and plaintiff in error, when under arrest, was compelled by the judge to make his statement with regard thereto, in order to get a little time to read the charge and consult counsel and plead thereto, had not been served with a copy of said charge, nor permitted to read same, nor had same been entered or read in his presence or brought to his knowledge, except through the statement of Mr. Dedmon, while plaintiff in error was under arrest and on his way to court, that it was the writing of such a letter with which plaintiff in error was charged; and plaintiff in error did not know how same was copied in said charge, and naturally assumed that the actual letter would be introduced in evidence, and plaintiff in error would be given an opportunity to read same and to testify with regard thereto and such admission as plaintiff in error made, prior to the reading of said charge, had reference to the letter actually dictated by plaintiff in error and not the purported copy of same, and in expectation that he would be given time to consult counsel, read the charge, and plead as he was lawfully entitled to do, and that if his request for reasonable time to consult counsel, read the charge and plead thereto were not granted, some semblance of a trial would be had.

(c) Plaintiff in error cannot lawfully be deprived of his liberty, without any evidence of guilt, solely upon his alleged admissions of dictating a letter to the Judge, when he was refused the right to continue his statement and show his good faith therein, as evidenced by the record as follows:

[fol. 118] Mr. Clay Coôke: I am now stating my good faith.

Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record. (Rec. p. 23.)

and was then immediately confined incommunicado and prevented from completing his statement, and refused the privilege of adding same later by the trial judge striking it from the record, and the holding of this Honorable Court that such statement made by defendant in a motion for time to consult counsel and plead can be

taken in lieu of evidence and as a substitute for a Constitutional trial violates fundamental human rights and Constitutional guaranties.

3

Plaintiff in error's Constitutional rights were violated in the following particulars:

(a) He was denied the privilege of reading the charge against him, and this Honorable Court erred in holding that he admitted dictating the letter set forth in said charge, in that no statement was made by plaintiff in error, after the reading of same, except as follows:

Mr. Clay Cooke: To which the defendants move first, as they have [fol. 119] moved, for a postponement and for time within which to plead and for time within which to employ counsel, as heretofore requested.

Judge Wilson: The motion is overruled.

Mr. Clay Cooke: Note the exception of respondents to the action of the Court in overruling respondents' request for a reasonable time to employ counsel and plead. (Rec. p. 27.)

(b) He was denied the privilege of pleading to said charge in writing and under oath, an inalienable right both at common law and under the Constitution.

(c) He was denied the opportunity to consult counsel before pleading to said charge, and the holding of this Honorable Court that a lawyer accused of crime is not entitled to the benefit of counsel is contrary to the express provisions of the Constitution, and the holding that plaintiff in error's law partner appeared for him is contrary to the facts, in that Mr. Dedmon reached the court room, as shown by the record, after sentence had been pronounced. Furthermore, the right of counsel even if granted without the privilege of consultation, is a barren right, and not that right guaranteed by the Constitution, and the trial judge had no right to insist upon a statement from accused as a prerequisite to the right to be represented by counsel.

[fol. 120] This Honorable Court having held:

"The defendants were entitled to a hearing upon the issue of their guilt or innocence"

and then having held:

"Cooke may not have had such a hearing as to his guilt as he was entitled to,"

therein stated the correct law of the case, but this Honorable Court having further held:

"It was, however, sufficient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him,"

erred in the following matters of fact:

The trial judge did not permit Cooke to state his defense to said charge, but only so much as served the purpose of the trial judge, the record showing:

Mr. Clay Cooke: I am now stating my good faith.

Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bills of exceptions in concluding the record.

[fol. 121] Mr. Clay Cooke: That affiant had heretofore been on friendly relations with said Judge James C. Wilson.

Judge Wilson: That is a matter that is wholly immaterial here; it don't make any difference how friendly.

Mr. Clay Cooke: I am stating my good faith in writing the letter. And affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of finding the necessary statutory affidavits of disqualification, and if said letter——

Judge Wilson: Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke: I am going to state why I did not proceed——

Judge Wilson: That does not constitute any defense to this contempt charge.

[fol. 122] Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

Judge Wilson: You may. (Rec. pp. 23-24.)

And such partial statement was before the charge was read, and before defendant had an opportunity to know the exact contents thereof, and purely for the purpose of obtaining a postponement for sufficient time to read the charge, consult counsel, and plead, and in the expectation that such lawful rights would be granted and a lawful hearing had. But defendant was immediately confined incommunicado, and refused permission or opportunity to make a complete statement, and when such completed statement was made at the first opportunity it was arbitrarily stricken from the record by the trial judge.

This Honorable Court erred therein in matter of law as follows:

(a) In holding that in criminal proceedings it is incumbent on the accused to prove his innocence, whereas the law requires the Government to establish the guilt of the defendant by competent evidence.

(b) In holding that the trial judge can require the accused to make a statement under arrest as a prerequisite to the granting of the right of counsel and time to plead, guaranteed by the sixth amendment to the Constitution, and then refuse him leave to com-[fol. 123] plete the statement, refuse him the right guaranteed by the Constitution, and without any semblance of a trial, convict him solely on the portion of his statement that such judge chooses to hear, said statement being made purely for the purpose of obtaining time to consult counsel and read the charge, and being made before the charge is read or defendant called upon to plead thereto or advised of the exact contents thereof. Such a holding violates both the letter and the Spirit of our Constitution: and would not be thought consistent with the principles of our law, if the charge were the violation of any penal statute.

5

This Honorable Court having held:

"The permission of the Court given him (Walker) to incorporate his defense in the record, could not take the place of a hearing of his defense before the tribunal before which he was being tried;"

there stated the correct principle of law, but failed to properly apply the same principle to the defendant Cooke, who was likewise refused opportunity to state his complete defense, but given opportunity to incorporate it in the record, as shown by the record above quoted, which procedure displays, not a trial or hearing, and is so found by this Court, but having gotten out of defendant just so much of a statement as suited his purpose, the said trial court arbitrarily closed his mouth, and gave him permission to add such state-[fol. 124] ment as he chose to make later to the bill of exceptions, which discloses that the judge had already convicted him before he was arraigned, or called upon to plead, and only granted him the right to state his defenses in a bill of exception, and this privilege was subsequently revoked.

6

This Honorable Court has erred in holding that in indirect contempt proceedings, such as this, that the accused

(a) Is not entitled to consult counsel.

(b) Is not entitled to be informed of the charge against him.

(c) Is not entitled to plead fully thereto, in writing.

(d) Is presumed to be guilty unless he establishes his innocence.

(e) Is not entitled to offer evidence in defense of the charge, or in extenuation thereof.

(f) Is not entitled to be confronted with the witnesses against him.

And therein has declined to give force and effect to the Sixth Amendment to the Constitution.

7

The holding of this Honorable Court:

"Cooke may not have had such a hearing as to his guilt as he was entitled to,"

[fol. 125] states the law of the case, but the holding,

"It was, however, sufficient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him,"

is error, in that neither this Honorable Court, nor the trial Court, can decide that a fair hearing, such as guaranteed by the Constitution, would have been of no benefit to the defendant, as the facts were not introduced in evidence, but assuming that such a trial would have shown that the letter as set forth in the charge was not correctly copied, and that the statements in the letter as to the prejudice and bias and the manner in which the judge developed same had been publicly admitted by the judge and that the letter was written purely for the friendly purpose of relieving embarrassment and preventing trouble; that instead of being induced by a criminal intent to hinder or obstruct the judge, the real purpose was to facilitate justice and prevent a miscarriage thereof, and to relieve all parties of a situation which had not only become embarrassing, but actually intolerable, this Honorable Court could not then fairly say that such a trial would have been of no benefit to defendant. Furthermore, having held that defendant was entitled under the law to a hearing and that he didn't get such a hearing as he was entitled to, the further finding that it would not have benefited him had it been given is beyond the lawful duty of the Court, which is to see that parties get what they are lawfully en- [fol. 126] titled to, and not whether their just and lawful rights, if granted, would benefit or injure them. The infliction of injuries or the conferring of benefits is no concern of Justice. The Court, the Government, and the defendant alike should be concerned only that justice is done and lawful rights protected, and illegal acts punished, irrespective of who is injured or benefited thereby.

8

The proceeding below, in its entity, was harsh, summary, cruel, and unjust, violated Constitutional and fundamental rights, and did not in any particular have the semblance of a trial as guaranteed by the Constitution of the United States.

9

The record shows that the Judge punished plaintiff in error for having a detective watch one member of a jury and for questioning the legality of the operations of the trustee and referee in bankruptcy, and not for writing said letter, and plaintiff in error's motion in arrest of judgment, arbitrarily stricken from the record by the trial Judge, clearly shows this, and this Honorable Court should have granted the motion for certiorari to perfect the record.

10

This Honorable Court erred in denying the motion of plaintiff in error for certiorari to bring up the complete record, including [fol. 127] defendant's answer to the charge and motion in arrest of judgment filed immediately after his release from custody, because

(a) The trial Judge granted leave in open court to the filing of same, and good faith requires that it be considered, because defendant relied upon such leave and privilege.

(b) Same constituted an absolute defense to said charge and should have been considered.

(c) Same was a part of the record of this Honorable Court and was arbitrarily stricken therefrom by the trial Judge after appeal perfected and all jurisdiction had passed to this Honorable Court.

(d) Government's counsel stipulated in writing with plaintiff in error's counsel that same should constitute part of the record on appeal, and said solemn stipulation was altered by the trial Judge after appeal perfected, over the signatures of the parties thereto and without their knowledge or consent.

(e) The striking of same from the record was a breach of faith on the part of the trial court, a breach of contract on the part of the Government, and the alteration of said record was a violation of law and the authority and jurisdiction of this Honorable Court.

Respectfully submitted, J. A. Templeton, E. Howard McCaleb, G. A. Stultz, attorneys for Plaintiff in Error.

[fol. 127a] We, the undersigned solicitors and counsel for plaintiff in error, do hereby certify that the foregoing application is made in good faith; that it is not made for the purpose of delay, and that, in our opinion, said petition is well founded in law.

——— ———, Attorneys for Plaintiff in Error.

Fort Worth, Texas, January 5th, 1923.

Argument in Support of Application for Rehearing

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the ac-

cusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

This is a criminal prosecution; that much must be conceded. Each and all of the above guaranties were denied. Honesty compels an [fol. 127b] acknowledgment of that fact. This Honorable Court finds two significant facts in its opinion: (a) That the defendant was entitled to a hearing; (b) that he did not receive what he was entitled to. But this Honorable Court escapes the duty imposed upon it of seeing that defendant gets what he is entitled to by holding that a trial, such as defendant was entitled to, would not have benefited him. How this Court, having neither seen nor heard one word of testimony that might or could have been produced, can conclusively say that a fair trial would not have benefited the defendant is hard to understand. To be just is the highest aspiration of man. To condone injustice because justice would be of no benefit is merely to say that Courts should be just only where justice benefits some party concerned. Justice is or should be administered by Courts without regard to benefits conferred or injuries inflicted, but solely because it is Justice. As said by Seneca:

"He who decides a matter without hearing both sides, though he may have decided right, has not done justice."

and this is spoken of by Blackstone as a "rule of natural reason." But this Honorable Court says though a just and fair hearing, such as defendant was unquestionably entitled to, was not granted, even if it had been it would not have benefited him. It would have benefited the Court at least to have granted a full, fair and complete hearing, because injustice injures most him who inflicts or condones it. It would have at least permitted the defendant, while serving [fol. 128] his thirty days in jail, at the instance of that Government which in time of war and stress, demands and receives his loyalty and devotion, to feel that in return therefor, the same Government is equally concerned and careful to guard and protect his liberty and his lawful rights. A man convicted after a fair trial can with good grace accept and endure his punishment, but a man punished without the semblance of a fair trial, by an angry judge in the heat of passion, for what is misunderstood by him to be a mere personal affront, is injured by the procedure, no matter how guilty he may be. It might well be said that a trial would not benefit a robber, murderer or rapist, but this fact does not excuse mob violence, and this Honorable Court would be quick to reverse such a conviction of a penal offense on this character of a hearing. Should not Courts of Appeal be equally as careful in protecting the fundamental rights of Liberty and the requirements of Justice when the offence charged is such that the trial Judge necessarily is personally interested and more than ever likely to deal unjustly?

Chief Justice Taft's opinion in the very recent case of Craig vs. Hecht, p. 124, U. S. Sup. Ct. Adv. Op., 68 L. ed., . . , is illuminating. He states:

The Federal statute concerning contempts, as construed by this court in prior cases, vests in the trial judge the jurisdiction to decide whether a publication is obstructive or defamatory only. The delicacy there is in the judge's deciding whether an attack upon his [fol. 129] own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and, if not successful in that Court, to apply to this Court for an opportunity for a similar review here."

How then can this Court or the Supreme Court review both "questions of law, and questions of fact," when no lawful procedure is followed, the evidence is suppressed, and the defendant's mouth closed?

There is no better argument directed at the record in this case that we can make than to quote a great lawyer to whom it was submitted, and who wrote:

"The pretense of following the formalities of the law had the manner of insincerity, and it would seem that the part of frankness and candor would have put in operation the Lettre de Cachet by which men were consigned to the bastile when the subject could not reason why."

To make a pretense of following the forms of the law, but denying the substance of all rights, is more oppressive and unjust than not to pretend to follow them at all. Injustice always masquerades in [fol. 130] the habiliments of justice, as a lie ever clothes itself in a half truth.

The defendant's conviction is upheld by this Court solely upon his admission. However, his admission, taken as a whole and not garbled, entirely exonerates him from any wilful contempt. Let us in fairness, however, examine the facts under which this conviction was obtained.

The defendant is representing a client against whom the trial judge harbored great personal prejudice and bias, if not actual malice, which needs no better proof than his sentence of the client in this case. Vast property rights are involved. In the conduct of two cases the judge had openly admitted and disclosed this attitude of mind and had disclosed that it was based upon hearsay concerning the defendant. Counsel feeling that no free American citizen in any court ought to be compelled to submit his property rights to a judge who admittedly was so biased and prejudiced from "what he had heard" concerning the client that he "questioned his own qualification" (using the judge's own public language), and feeling that his own sworn duty to his client requires him to take some steps to assure that fair and impartial trial to which every citizen is entitled, dictates, with the friendliest intentions possible, a letter to the judge

seeking only a fair judge for his client in future cases, and giving as his reasons only those things which the judge himself had publicly admitted to exist. In this he expressly reserves to the judge the [fol. 131] right freely and untrammelled to pass on any unfinished matters, the disposition of which had been entered upon. In fact, every single word of the letter could have been put in a public disqualifying affidavit as a statutory right. Ten days later a U. S. Marshal walks into his office and places him under arrest at about 10 a. m., without notice of any charge being filed against him. On his way to the court room he is informed by his partner, whom he meets, that the offense charged is the writing of such letter. He is presented instan-er before the judge, where he asks for a reasonable time to investigate the charge, consult counsel and plead thereto, all of which fair and reasonable requests are denied, and he is immediately incarcerated, where he is held incommunicado and not permitted to confer with counsel in order to perfect his record and his appeal. And as a good, loyal citizen he is expected to serve the 30 days in jail and come out with feelings of high respect and veneration for the tribunal that sent him there. This character of procedure will not accomplish the purpose for which all punishments are designed. We can see also that such a practice is not calculated to invite or obtain for courts that public respect which they ought to have, and without which they cannot function properly and effectively.

Plaintiff in error's sworn duty was to see that his client obtained a fair and impartial trial. In view of the many proceedings pending it was manifestly impossible at any stated period to disqualify the judge in undisposed of cases, except at a time when some unfinished [fol. 132] matter in another case would be pending before him. However, in these unfinished matters the judge's right to act thereon was expressly acknowledged in the letter, and nothing therein contained could influence any man of ordinary firmness of character, and it is not possible to fairly say that the writer had any such intention; at least no such intention is conclusively evidenced in the letter itself, even if it could be found from the record to be correctly set forth in the charge. We believe we can safely assert that counsel would not have been in contempt even had he asked that the judge voluntarily permit even these undisposed of matters to be passed upon by some other judge. The letter discloses, however, that the writer intended to assure the judge that his full and untrammelled right to pass upon these other undisposed of matters would not be questioned by disqualifying affidavit or otherwise.

The most the letter discloses is a mistake of judgment and a too great reliance on the previous friendly attitude of the judge toward the writer. It fails to disclose a criminal intent, which is a necessary element of every crime, and the defendant's statement upon which alone the conviction is upheld, denies any such intent. The only objection urged by the trial judge in the charge preferred is the statement of the writer's former opinion that the judge was big enough and broad enough to overcome the bias and prejudice admittedly existing, and the conclusion that he was mistaken therein.

This is neither contempt nor an *attempt to influence* action. It is [fol. 133] merely the statement of a truth which this record clearly discloses. It is an unfortunate situation that a lawyer may with flattery and praise seek to and actually influence judicial action, but that in truth and candor he cannot give the judge his true mental measurement without being sent to jail. This is not as it should be. As said by a great judge:

"An independent and unterrified bar is the best assurance of an uncorrupt and incorruptible judiciary."

We respectfully urge that under this Court's opinion as well as under the record, a wrong conclusion has been arrived at and for the errors complained of a rehearing of this cause should be granted. We believe that, if any doubt exists that Constitutional guaranties have been violated, this Honorable Court ought to certify the whole record to the Supreme Court.

Respectfully submitted,

J. A. Templeton, E. Howard McCaleb, G. A. Stultz, Attorneys for Plaintiff in Error.

[fol. 134] [Title omitted]

It is ordered by the Court that the petition for re-hearing, filed in this cause, be, and the same is hereby, denied.

[fol. 135] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 93 to 134 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4068, wherein Clay Cooke and J. L. Walker are plaintiffs in error and The United States of America is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 92 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the

City of New Orleans, Louisiana, in the Fifth Circuit, this 12th day of February, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 136] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 864

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

ORDER ALLOWING CERTIORARI—Filed April 7, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

April 7, 1924.

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AUTHORITIES CITED

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No.....

Supreme Court of the United States

OCTOBER TERM, 1923.

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

Petition and Notice for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support of Application.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

NO. .....

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

Notice of Application to the Supreme Court for Writ of Certiorari.

The respondent, United States of America, and its District Attorney, Henry Zweifel, and J. M. McCormick, Special Prosecutor are hereby notified that the petitioner, Clay Cooke, will, on Monday, the 17th day of March, A. D. 1924 at the opening of the Court on that date, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States, in the city of Washington, D. C., his certified petition for a writ of certiorari from the Supreme Court of the United States, to the United States Circuit Court of Appeals for the Fifth Circuit in the cause No. 4068 on the docket of the said United

States Circuit Court of Appeals, styled Clay Cooke and J. L. Walker, Plaintiffs in error, vs. the United States of America, Defendant in error, and you are herewith delivered a copy of said petition for a writ of certiorari and brief in supoprt thereof.

J. A. TEMPLETON,
W. E. SPELL,
CHAS. A. BOYNTON,
E. HOWARD McCALEB,
G. A. STULTZ,
EDWIN C. BRANDENBURG,
Attorneys for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy of the said notice of said petition for writ of **certiorari** and brief is hereby acknowledged on this the.....day of March, 1924, at the City of Fort Worth, State of Texas.

.....
U. S. District Attorney.

.....
Special Prosecutor.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

NO. .....

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Clay Cooke, petitioner, respectfully shows:

On the 26th day of February, 1923, the Clerk of the District Court for the United States for the Northern District of Texas, Fort Worth Division, issued a writ of attachment directed to the Marshal of said District, commanding him to attach the bodies of Clay Cooke and J. L. Walker, and to have them before the Honorable District Court of the United States, at the City of Fort Worth, Texas, instanter, then and there to show cause, if any they have, why they should not be punished for criminal contempt. (R. p. 8).

Which writ the Marshal executed as shown by his return as follows:

> "Received this writ the 26th day of Feb'y, 1923, and executed the same on the 26th day of Feb'y, 1923, by attaching the bodies of Clay Cooke and J. L. Walker, and taking them before the Hon. James C. Wilson, U. S. District Judge, at Fort Worth, Texas, who ordered them in Jail for thirty days." (R. p. 8).

The writ of attachment did not give any notice of the nature of the charge against petitioner, who is a practicing attorney, nor of the charge against his client, J. L. Walker. There was no affidavit for contempt filed nor any other authentic charge. There appears in the record, however, as sent up by the Clerk, what is evidently intended to be the charge against petitioner (Rec. pp. 1 to 7). This consists of some unsigned typewritten mater, without file mark, and not even to this day entered on any record of the Court. Presumptively, it was left with the Clerk by the Judge of the Court, as a basis for said writ of attachment, but is not signed nor entered on any record of the Court, nor did any copy of same accompany the writ of attachment.

This document purports to charge your petitioner and his client, J. L. Walker, with contempt of Court, in writing and causing to be delivered to the Judge of said Court, a letter, set forth in said purported charge as follows:

Fort Worth, Texas, February 15, 1923.

Hon. James C. Wilson,
Judge U. S. District Court,
Fort Worth, Texas.

Dear Sir:

In Re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker.

In Re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.

In Re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker.

In Re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker.

In Re No. 1001, In Bankruptcy, Walker Grain Company.

Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters, and as a friend of the Judge of this Court, to suggest that the only order that I will consent to your Honor's entering in any of the above mentioned matters now pending in your Honor's Court, is
ing in your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having, however, proceeded to enter* judgment in the petition for review of the action of the Referee on the summary orders

* Typo. error. Should be "previously entered."

against the Farmers & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer, and an honest man is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable† thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken,

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† Typo. error. Should be "The only honorable thing I can do in the above styled matters, is to suggest that Your Honor note Your Honor's disqualification," etc.

also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment Your Honor's pleasure with respect to the matters herein presented, so that further steps may be avoided.

With very great respect, I beg to remain,

Yours most truly,
CLAY COOKE.
(Rec. pp. 4-6).

The instrument further recites:

Since the matters of fact set forth herein are within the personal knowledge of the judge of this Court, and since it is the view of this Court that said letter as a whole is an attack upon the honor and integrity of the Court, wherein it charges that the Judge of this Court is not big enough and broad enough to truly pass upon matters pending therein, and wherein it charges in effect that the judge of this Court has allowed himself to be improperly approached and influenced and whispered

> to by interested parties against a litigant in the Court, and since it is the view of this Court that such an act by a litigant and his attorney constitutes misbehavior and a contempt under the law and that the threats and impertinence and insult in said letter were deliberately and designedly offered with intent to intimidate and improperly influence the Court in matters then pending and soon to be passed upon, and to destroy the independence and impartiality of the Court in these very matters, it is ordered that an attachment immediately issue for the said J. L. Walker and Clay Cooke, and that the Marshal of this Court produce them instanter before this Court to show cause, if any they have, why they should not be punished for contempt. (Rec. pp. 6-7).

Petitioner upon being placed under arrest did not know for what he was arrested and required to show cause, but sent his law partner, Mr. P. G. Dedmon, ahead to the Federal Court while the Marshal was arresting Mr. Walker, to learn the nature of the accusation, and on the way to the Federal Building in custody of said Marshal, petitioner met Mr. Dedmon and learned that he was charged with writing said letter, but petitioner was never served with any notice of any kind of the nature of said charge against him, nor was he allowed to read same. The bill of exceptions, pages 16 to 34 of the Record, discloses what occurred when the Marshal presented petitioner before the bar of said Court.

Petitioner first asked to be allowed the benefit of

counsel, which was denied by the Court (Rec. pp. 16-17). Petitioner then requested time to prepare and file his defense (Rec. pp. 17 to 19), which was also denied by the Court, the Judge stating:

> "Unless you desire now to state that you have some defense you care to file and present, and indicate what that defense is to this charge, then I shall direct that this proceeding go forward. Now, if you have any defense that is pertinent, state what it is." (Rec. p. 20).

Your petitioner, thereupon, attempted, while in charge of the Marshal, to dictate to the Court Stenographer a motion for time to employ counsel, read the charge against him, and plead thereto (Rec. pp. 21 to 27), but was repeatedly interrupted and prohibited by the Court from even dictating to the Court Stenographer such motion, the record showing:

> "That the alleged bias and prejudice of his Honor Judge James C. Wilson in the matters in which J. L. Walker was interested is a matter of common knowledge in Fort Worth, and is generally talked and discussed in Fort Worth; that affiant believed that said bias and prejudice—
>
> The Court:
>
> That does not constitute any defense.
>
> Mr. Clay Cooke:
>
> I'll state then something otherwise—

Judge Wilson:

Repeating the insult does not constitute any defense.

Mr. Clay Cooke:

I am not trying to repeat the insult, if your Honor please—that affiant read said letter—

Judge Wilson:

However, as to that, you may later prepare—

Mr. Clay Cooke:

I am now stating my good faith.

Judge Wilson:

I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record.

Mr. Clay Cooke:

That affiant had heretofore been on friendly relations with said Judge James C. Wilson—

Judge Wilson:

That is a matter that is wholly immaterial here, it don't make any difference how friendly.

Mr. Clay Cooke:

I am stating my good faith in writing the letter, and affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of filing the necessary statutory affidavits of disqualification, and if said letter—

Judge Wilson:

Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke:

I am going to state why I did not proceed—

Judge Wilson:

That does not constitute any defense to this contempt charge.

Mr. Clay Cooke:

Can I put that in about writing the letter? Can I put that in later?

Judge Wilson:

You may." (Rec. pp. 22-24).

Thereupon, for the first time, the purported charge was read by the District Attorney (Rec. p. 27). Whereupon petitioner moved the Court as follows:

Mr. Clay Cooke:

To which the defendants move first, as they have moved, for a postponement and for time within which to plead and for time within which to employ counsel, as heretofore requested.

Judge Wilson:

The motion is overruled.

Mr. Clay Cooke:

Note the exception of respondents to the action of the Court in overruling respondents'

request for a reasonable time to employ counsel and plead.

Defendant excepts to the action of the Court as shown by the foregoing record in refusing to permit them any time to consult counsel or to plead in answer to said rule to show cause; that had defendants been permitted to consult counsel and answer or plead to said writ, defendants would have answered and did thereafter answer as shown by their answer filed in said cause. (Rec. pp. 27-28).

Petitioner naturally assumed that a trial of some nature would be had, and that he would, at least, be given an opportunity to show by evidence that the letter, as copied in the purported charge is not correctly transcribed, and further that the facts set forth in the letter as to the bias and prejudice of the Judge of said Court against petitioner's client were true and that same was based upon "what he had heard" about said client was publicly asserted by the Judge himself, who even stated that he "questioned his own qualification" by reason of such reports that he had heard, and further that in the case tried he had publicly denounced petitioner's client upon rumors he had heard, and that petitioner would be permitted to show by evidence his good faith, friendly intentions, and lack of criminal intent. However, petitioner was given no opportunity to either plead orally or in writing to the charge, after the overruling of his motion aforesaid, nor was he in any manner arraigned or called upon to plead, either as guilty or not guilty, nor was evidence of any kind

offered by the Government to prove the charge, but the Judge peremptorily ordered petitioner and his client to jail for thirty days, without any character of proof of guilt. (Rec. p. 29). In doing so, the Judge took occasion again to denounce petitioner and his client on other matters "he had heard," not embraced in said charge. (Rec. pp. 30 to 32).

That this denunciation was wholly unmerited is clearly shown by petitioner's verified answer and motion in arrest of judgment subsequently filed in accordance with the leave granted, as above shown, which answer and motion in arrest of judgment, also shows conclusively that the sentence was imposed wholly upon the other matters referred to in said sentence, and not for the writing of said letter.

Petitioner and his client were then immediately incarcerated inthe County jail, where they were not permitted to communicate with counsel or friends, until some lawyer friends perfected a writ of error and gave bond without consultation with petitioner. (Rec. p. 35).

Upon the release of petitioner from jail, he immediately employed counsel, prepared and filed his verified answer, supported by affidavits, in the nature of a motion in arrest of judgment, and presented same to the District Judge for action thereon, but said Judge refused to act thereon one way or the other. (Rec. pp. 93 to 98). Petitioner then presented his petition and bond for writ of error, March 19th, 1923, which the Court approved and ordered substituted for

the appeal papers approved and filed by petitioners' friends, while he was held in jail incommunicado. (Rec. p. 35). The assignments of error were filed with reference to this verified answer and motion in arrest of judgment (Rec. pp. 41 to 87), and petitioner procured a stipulation, signed by his Counsel and by the District Attorney, and also by J. M. McCormick, Esq., Special Counsel engaged by the Court to assist in the prosecution, as to the contents of the record on appeal, which included, as a part of said record, said answer and motion in arrest of Judgment being item "e" thereof (Rec. p. 89).

The Judge of the Court scratched this item out of said signed stipulation after it was filed, over counsel's signature, without their knowledge or consent, and orally directed the Clerk to omit same from the record on appeal. (Rec. pp. 93 to 98).

Petition for writ of certiorari was filed in the Honorable Circuit Court of Appeals, for the Fifth Circuit immediately upon filing the record therein to perfect the record by requiring the clerk to send up a certified copy of said answer and motion in arrest of judgment as a part of the record in said cause, which motion was denied April 5th, 1923. (Rec. p. 102).

The transcript on writ of error was duly filed in the Honorable Circuit Court of Appeals for the Fifth Circuit, which Court by opinion rendered December 26th, 1923, reversed the sentence against petitioner's client, but affirmed the sentence against petitioner. (Rec. pp. 94 to 103). The Circuit Court of Appeals

in its opinion holds that petitioner was entitled to a fair hearing on the question of his guilt or innocence of the charge, and further holds that petitioner may not have received the character of hearing to which he was unquestionably entitled, but affirmed said case on the assumption that a fair and legal hearing "would not have benefited" petitioner; this, notwithstanding there was no evidence whatever of guilt or innocence offered, defendant was refused the right to even plead in his defense, and his defense filed later in accordance with the leave granted and incorporated in the record by stipulation of counsel, was ordered out of the record by the trial judge, who himself altered the solemn, signed contract between his own special prosecutor, the District Attorney, and petitioners' Counsel by striking out of said stipulation the said instrument item "e" thereof. (Rec. p. 89).

Petitioner filed in the Circuit Court of Appeals his motion for rehearing on the 7th day of January, 1924 (Rec. pp. 105 to 126), wherein he moved said Court to certify to the Honorable Supreme Court the Constitutional questions involved in said cause, which motion was overruled without written opinion on the 1st day of February, 1924. (Rec. p. 127).

Your petitioner shows that a certified copy of the entire transcript of the record in this case, including proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, to which the writ of certiorari herein prayed for is asked to be directed, is hereby furnished as an exhibit to this petition, as

required by Rule No. 37 of this Court and marked Exhibit A.

The following are the general reasons relied upon by petitioner for the allowance of the writ of certiorari herein prayed for, to-wit:

FIRST.

The Honorable Circuit Court of Appeals has erred in holding that in indirect contempt proceedings, such as this, that the accused

(a) Is not entitled to consult counsel.

(b) Is not entitled to be informed of the charge against him.

(c) Is not entitled to plead fully thereto, in writing.

(d) Is presumed to be guilty unless he establishes his innocence.

(e) Is not entitled to offer evidence in defense of the charge, or in extenuation thereof.

(f) Is not entitled to be confronted with the witnesses against him.

And therein has declined to give force and effect to the Sixth Amendment to the Constitution.

SECOND.

Petitioner's Constitutional rights were violated in the following particulars:

(a) He was denied the privilege of reading the charge against him, and the Honorable Circuit Court of Appeals erred in holding that he admitted dictating the letter set forth in said charge, in that no statement was made by petitioner, after the reading of same, except to move for time within which to plead and for time within which to employ counsel, which motion was overruled.

(b) He was denied the privilege of pleading to said charge in writing and under oath, an inalienable right both at Common Law and under the Constitution.

(c) He was denied the opportunity to consult counsel before pleading to said charge, and the holding of the Honorable Circuit Court of Appeals that a lawyer accused of crime is not entitled to the benefit of counsel is contrary to the express provisions of the Constitution, and the holding that petitioner's law partner appeared for him is contrary to the facts, in that Mr. Dedmon reached the court room, as shown by the record, after sentence had been pronounced and petitioner taken to jail; furthermore the right to counsel, even if granted, without the privilege of consultation, is a barren right, and not that right guaranteed by the Constitution, and the trial Judge had no right to insist upon a statement from accused as a prerequisite to the right to be represented by counsel, and then refuse him counsel.

(d) He was not arraigned, permitted, or required to plead to said charge, even orally.

THIRD.

There is no evidence in the record to support the charge, in that:

(a) No evidence whatever was introduced by the Government.

(b) There was and is no evidence that the letter actually written is as copied in the charge, and petitioner, when under arrest was compelled by the Judge to make his statement with regard thereto, in order to get a little time to read the charge and consult counsel and plead thereto, had not been served with a copy of said charge, nor permitted to read same, nor had same been entered or read in his presence or brought to his knowledge, except through the statement of Mr. Dedmon as aforesaid, and petitioner naturally assumed that the actual letter would be introduced in evidence, and petitioner would be given the opportunity accorded even the darkest criminal to read same and to testify with regard thereto, and such admission as plaintiff in error made, prior to the reading of said charge had reference to the letter actually dictated by petitioner and not the purported copy of same, and in expectation that he would be given time to consult counsel, read the charge, and plead as he was lawfully entitled to do, and that if his request for reasonable time to consult counsel, read the charge and plead thereto were not granted, some semblance of a trial would be had.

(c) Petitioner cannot lawfully be deprived of his

liberty, without any evidence of guilt, solely upon his alleged admissions of dictating a letter to the Judge, when he was refused the right to continue his statement and show his good faith therein, as evidenced by the record, as follows:

> Mr. Clay Cooke:
>
> I am now stating my good faith.
>
> Judge Wilson:
>
> I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record. (Rec. p. 23).

And was then immediately confined incommunicado and prevented from completing his statement, and refused the privilege of adding same later by the trial judge striking it from the record, and the holding of the Honorable Circuit Court of Appeals that such statement made by a defendant in a motion for time to consult counsel and plead can be taken in lieu of evidence and as a substitute for a Constitutional trial violates fundamental human rights and Constitutional guaranties.

FOURTH.

The Honorable Circuit Court of Appeals having held:

> **"The defendants were entitled to a hearing upon the issue of their guilt or innocence,"**

and then having held:

> "Cooke may not have had such a hearing as to his guilt as he was entitled to,"

therein stated the correct law of the case, but having further held:

> "It was, however, sufficient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him,"

erred in the following matters of fact:

The trial judge did not permit Cooke to state his defense to said charge, but only so much as served the purpose of the trial judge, the record showing:

> Mr. Clay Cooke:
>
> I am now stating my good faith.
>
> Judge Wilson:
>
> I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bills of exceptions in concluding the record.
> Mr. Cooke:
>
> That affiant had heretofore been on friendly relations with said Judge James C. Wilson.
> Judge Wilson:
>
> That is a matter that is wholly immaterial here; it don't make any difference how friendly.
>
> Mr. Clay Cooke:
>
> I am stating my good faith in writing the

letter. And affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of finding the necessary statutory affidavits of disqualification, and if said letter—

Judge Wilson:

Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privflege. You understood, as a lawyer, how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke:

I am going to state why I did not proceed—

Judge Wilson:

That does not constitute any defense to this contempt charge.

Mr. Clay Cooke:

Can I put that in about writing the letter? Can I put that in later?

Judge Wilson:

You may. (Rec. pp. 23-24).

And such partial statement was made before the charge was read, and before petitioner had an opportunity to know the exact contents thereof, and purely for the purpose of obtaining a postponement for sufficient time to read the charge, consult counsel, and pleaed, and in the expectation that such lawful rights would be granted and a lawful hearing had.

The Honorable Circuit Court of Appeals erred therein in matter of law as follows:

(a) In holding that in criminal proceedings it is incumbent on the accused to prove his innocence, whereas the law required the Government to establish the guilt of the defendant by competent evidence.

(b) In holding that the trial judge can require the accused to make a statement under arrest as a prerequisite to the granting of the right of counsel and time to plead, guaranteed by the Sixth Amendment to the Constitution, and then refuse him leave to complete the statement, refuse him the right guaranteed by the Constitution, and without any semblance of a trial, convict him solely on the portion of his statement that such judge chooses to hear. Such a holding violates both the letter and the spirit of our Constitution ;and would not be thought consistent with the principles of our law, if the charge were the violation of any penal statute.

FIFTH.

The Honorable Circuit Court of Appeals having held:

> "The permission of the Court given him to incorporate his defense in the record, could not take the place of a hearing of his defense before the tribunal before which he was being tried;"

there stated the correct principle of law, but failed to properly apply the said principle to the petitioner

who was refused opportunity to state his complete defense, but given opportunity to incorporate it in the record, as shown by the record above quoted, which procedure displays, not a trial or hearing, and is so found by said Circuit Court of Appeals, but having gotten out of petitioner just so much of a statement as suited his purpose, the said trial court arbitrarily closed his mouth, and gave him permission to add such statement as he chose to make later to the bill of exception, which discloses that the judge had already convicted him before he was arraigned, or called upon to plead, and only granted him the right to state his defenses in a bill of exception, and even this privilege was subsequently denied.

SIXTH.

There was no legal or lawful charge filed against plaintiff in error, in that:

(a) There was no affidavit or other authenticated charge filed against petitioner. The purported charge set forth against plaintiff in error is not signed, filed, nor was same entered on any record of said Court.

(b) Said purported charge does not allege any offense against the law in that it does not allege that any statement made in the purported letter is false, nor does it allege any facts showing wherein said letter obstructed the administration of justice in said Court.

SEVENTH.

No lawful trial was had and no lawful procedure followed in obtaining said conviction, in that:

(a) Petitioner was not allowed to plead to the purported charge.

(b) No evidence was offered against petitioner, and he was not permitted to offer evidence in his defense.

(c) Petitioner was denied the right of counsel.

(d) Petitioner was sentenced for other matters than those contained in the purported charge.

(e) The purported charge does not state any offense against the laws.

EIGHTH.

The record shows that the trial judge punished petitioner for having a detective watch one member of a jury and for questioning the legality of the operations of the trustee and referee in bankruptcy, and not for writing said letter, and petitioner's answer and motion in arrest of judgment, arbitrarily stricken from the record by the trial judge, clearly shows this.

And the Honorable Circuit Court of Appeals erred in denying petitioner's motion for certiorari to bring up the complete record, including defendant's answer to the charge and motion in arrest of judgment filed immediately after his release from custody, because

(a) The trial judge granted leave in open court to the filing of same, and good faith requires that it be considered, because defendant relied upon such leave and privilege.

(b) Same constituted an absolute defense to said charge and should have been considered.

(c) Same was a part of the record of said Court of Appeals and of this Honorable Court, and was arbitrarily stricken therefrom by the trial judge after appeal perfected and all jurisdiction had passed to the Appellate Court.

(d) Government's counsel stipulated in writing with plaintiff in error's counsel that same should constitute part of the record on appeal, and said solemn stipulation was altered by the trial judge after appeal perfected, over the signatures of the parties thereto, and without their knowledge or consent.

(e) The striking of same from the record was a breach of faith on the part of the trial Court, a breach of contract on the part of the Government, and the alteration of said record was a violation of law and the authority and jurisdiction of this Honorable Court.

NINTH.

The issue involved herein is vital to the liberty of citizens under the Constitution, and is of such importance that the record ought to be reviewed by this Honorable Court.

In our brief we cite pertinent authorities of this Honorable Court, in support of the foregoing propositions.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding said Court to certify and send to this Court, on a date certain to be therein designated, a full and complete transcript of the record of all the proceedings of the said Circuit Court of Appeals in the said case entitled **Clay Cooke and J. L. Walker, Plaintiffs in Error, versus United States of America, Defendant in Error,** No. 4068 of its Docket, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief and remedy in the premises as to this Honorable Court may seem appropriate and in conformity with law; and that the said judgment of the said United States Circuit Court of Appeals for the Fifth Circuit in said cause may be reversed by this Honorable Court, and your petitioner will ever pray.

J. A. TEMPLETON,
G. A. STULTZ,
E. HOWARD McCALEB,
W. E. SPELL,
CHAS. A. BOYNTON,
EDWIN C. BRANDENBURG,
Attorneys for Petitioner.

STATE OF TEXAS,
COUNTY OF TARRANT.

I, Clay Cooke, being first duly sworn, on oath state that I am the petitioner in the above case, and that I have read the above and foregoing petition and know the contents thereof and that the allegations therein contained are true as I verily believe.

.....

Sworn to and subscribed before me this.....day of March, A. D. 1924.

.....

Notary Public, Tarrant County, Texas.

We hereby certify that we have examined the foregoing petition, and in our opinion the said petition is well founded in law.

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Attorneys.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Petitioner's Conviction Was Obtained Without Due Process of Law.

The letter, which is apparently the basis for the charge against petitioner, purports to be set forth on page 4 of the Record.

This is dated February 15th, 1923, and is alleged to have been delivered at 11:15 A. M. February 16th. (Rec. p. 3). The charge fails to set forth wherein the delivery of the letter obstructed the administration of justice. It fails to state any offense.

The attachment under which petitioner was arrested and confined was issued ten days later. No notice whatever was given petitioner of said charge, although the trial Judge evidently had ten days time within which to formulate same, employ special Counsel to prosecute petitioner; and then, after such careful preparation, a United States Marshal brings petitioner before the Judge, and there petitioner is denied all reasonable opportunity to investigate the charge, obtain the benefit of counsel, plead thereto, or purge himself of said charge of contempt, and without any lawful procedure whatever, is, without any evidence, without any affidavit of anyone, ordered summarily to jail for thirty days, not for writing the alleged letter, but for other and different offenses, which someone had told the judge about, or concerning which he

held some character of affidavit, which he fails to make public.

It is apparent that the trial Judge did not desire to hear any defense whatever, and the Honorable Circuit Court of Appeals well says that "The permission of the Court given him to incorporate his defense in the record could not take the place of the hearing of his defense before the tribunal before which he was being tried." Yet that Court, in affirming the case against petitioner, retracts its own words by saying "a further and more deliberate hearing would have been of no benefit to him."

Is the conferring of benefits or the infliction of injuries any concern of Justice?

Justice is or should be administered by Courts without regard to benefits conferred or injuries inflicted, but solely because it is Justice. As said by Seneca:

> "He who decides a matter without hearing both sides, though he may have decided right, has not done justice,"

and this is spoken of by Blackstone as a "rule of natural reason.

But the Honorable Circuit Court of Appeals says that though a just and fair hearing, such as petitioner was unquestionably entitled to, was not granted, even if it had been it would not have benefited him. It would have benefited the Court at least to have granted a full, fair and complete hearing, be-

cause injustice injures most him who inflicts or condones it. It would have at least permitted the defendant, while serving his thirty days in jail, at the instance of that Government which in time of war and stress demands and receives his loyalty and devotion, to feel that in return therefor the same Government is equally concerned and careful to guard and protect his liberty and his lawful rights. A man convicted after a fair trial can with good grace accept and endure his punishment, but a man punished without the semblance of a fair trial, by an angry judge in the heat of passion, for what is misunderstood by him to be a mere personal affront, is injured by the procedure, no matter how guilty he may be. It might well be said that a trial would not benefit a robber, murderer or rapist, but this fact does not excuse mob violence, and any Court in the land would be quick to reverse a conviction of a penal offense on this character of a hearing. Should not Courts of Appeal be equally as careful in protecting the fundamental rights of Liberty and the requirements of justice when the offense charged is such that the trial Judge necessarily is personally interested and more than ever likely to deal unjustly?

Chief Justice Taft's opinion in the very recent case of Craig vs. Hecht, p. 124, U. S. Sup. Ct. Adv. Op., 68 L. ed., is illuminating. He states:

> "The Federal statute concerning contempts, as construed by this court in prior cases, vests in the trial judge the jurisdiction to decide whether a publication is obstructive or de-

> famatory only. The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question **on facts and law** reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and, if not successful in that Court, to apply to this Court for an opportunity for a similar review here."

How then can the Appellate Court or the Supreme Court review both "**questions of law and questions of fact,**" when no lawful procedure is followed, the evidence is suppressed, and the defendant's mouth closed and his answer stricken from the record?

To condone injustice because justice would be of no benefit is merely to say that Courts should be just only where justice benefits some party concerned.

There is no better argument directed at the record in this case that we can make than to quote a great lawyer to whom it was submitted, and who wrote:

> "The pretense of following the formalities of the law had the manner of insincerity, and it would seem that the part of frankness and candor would have put in operation the Lettre de Cachet by which men were consigned to the Bastile when the subject could not reason why."

To make a pretense of following the forms of the law, but denying the substances of all rights, is more oppressive and unjust than not to pretend to follow them at all. Injustice always masquerades in the habiliments of justice, as a lie ever clothes itself in a half truth.

Petitioner's conviction is upheld by the Circuit Court of Appeals solely upon his admission. However, his admission, taken as a whole, and not garbled, entirely exonerates him from any wilful contempt. Let us in fairness, however, examine the facts under which this conoviction was obtained.

Petitioner is representing a client against whom the trial judge harbored great personal prejudice and bias, if not actual malice, which needs no better proof than his sentence of the client in this case. Vast property rights are involved. In the conduct of two cases the judge had openly admitted and disclosed this attitude of mind and had disclosed that it was based upon heafsay concerning the client. Counsel, feeling that no free American citizen in any court ought to be compelled to submit his property rights to a judge who admittedly was so biased and prejudiced from "what he had heard" concerning the client that he "questioned his own qualification" (using the judge's own public language), and feeling that his own sworn duty to his client required him to take some steps to assure that fair and impartial trial to which every citizen is entitled, dictates, with the friendliest intentions possible, a letter to the

judge seeking only a fair judge for his client in future cases, and giving as his reasons only those things which the judge himself had publicly admitted to exist. In this he expressly reserves to the judge the right freely and untrammelled to pass on any unfinished matters, the disposition of which had been entered upon. Ten days later a U. S. Marshal walks into his office and places him under arrest at about 10 a. m., without notice of any charge being filed against him. On his way to the court room he is informed by his partner, whom he meets, that the offense charged is the writing of such letter. He is presented instanter before the judge, where he asks a reasonable time to investigate the charge, consult counsel and plead thereto, all of which fair and reasonable requests are denied, and he is immediately incarcerated, where he is held incommunicado and not permitted to confer with counsel in order to perfect his record and his appeal. And as a good, loyal citizen he is expected to serve 30 days in jail and come out with feelings of high respect for the tribunal that sent him there. This character of procedure will not accomplish the purpose for which all punishments are designed. We can see also that such a practice is not calculated to invite or obtain for courts that public respect which they ought to have, and without which they cannot function properly and effectively.

Petitioner's sworn duty was to see that his client obtained a fair and impartial trial. In view of the many proceedings pending it was manifestly impos-

sible at any stated period to disqualify the judge in undisposed of cases, except at a time when some unfinished matter in another case would be pending before him. However, in these unfinished matters the judge's right to act thereon was expressly acknowledged in the letter, and nothing therein contained could influence any man of ordinary firmness of character, and it is not possible to fairly say that the writer had any such intention; at least no such intention is conclusively evidenced in the letter itself, even if it could be found from the record to be correctly set forth in the charge. We believe we can safely assert that counsel would not have been in contempt had he asked that the judge voluntarily permit even these undisposed of matters to be passed upon by some other judge. The letter discloses, however, that the writer intended to assure the judge that his full and untrammelled right to pass upon these other undisposed of matters would not be questioned by disqualifying affidavit or otherwise.

The most the letter discloses is a mistake of judgment and a too great reliance on the previous friendly attitude of the judge toward the writer. It fails to disclose a criminal intent, which is a necessary element of every crime, and the defendant's statement, upon which alone the conviction is upheld, denies any such intent. The only objection urged by the trial judge in the charge preferred is the statement of the writer's former opinion that the judge was big enough and broad enough to overcome the bias and

prejudice admittedly existing, and the conclusion that he was mistaken therein. This is neither contempt nor an attempt to influence action. It is merely the statement of a truth which this record clearly discloses. It is an unfortunate situation that a lawyer may with flattery and praise freely seek to and actually influence judicial action, but that in truth and candor he cannot give the judge his true situation without being sent to jail. This is not as it should be. As said by a great judge:

> "An independent and unterrified bar is the best assurance of an uncorrupt and incorruptible judiciary."

Constitutional Rights Violated in Procuring Petitioner's Conviction.

Our Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

> "No person shall be deprived of life, liberty or property, without due process of law."

This is a criminal prosecution resulting in deprivation of liberty. That much must be conceded. This Court has so held repeatedly. Each and all of the protective provisions of the Constitution were violated in the procedure. Petitioner was given no in-

formation of the nature and cause of the accusation, he was not confronted with any witnesses against him, he was not allowed process for obtaining witnesses in his favor, he was denied the assistance of counsel for his defense, he was deprived of his liberty without any process worthy of the definition of "due process of law," as given by Mr. Webster in the Dartmouth College case:

> "A law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

How poorly does the record in this case comport with the principles laid down by a contemporary Court of the same judicial system, in **Phillips S. & T. Co. vs. Amalgamated Assn., 208 Fed. 335**, wherein the proper procedure is outlined in the following language:

> "The power to punish for contempt is to be used sparingly and with great caution and deliberation. The purpose in invoking the exercise of such power is the enforcement of the law and lawful orders and the punishment of acts of disobedience. A Court thus called upon to enforce the law may itself keep well within its limits.
>
> "It is not a party to the proceeding. In punishing for contempt the judge acts impersonally, and has no interest or concern other

> than that the law should be obeyed and enforced. **To justify punishment whether of a remedial or punitive character, the charge against the accused and the course of procedure must meet legal requirements, and the proof must conform to the settled rules of evidence."**

If the learned judge just quoted is right, then the procedure in this case is wrong.

The Sixth Circuit Court of Appeals said in **Dana vs. Aluminum Castings Co., 214 Fed. 936:**

> "Respondents were unquestionably entitled to be informed of the charge made against them, and so clearly and definitely as not only to show prima facie a case against them, but that when arraigned they might know what answer to make, and to enable them to prepare their defense."

And this Honorable Court stated in **Gompers vs. Buck Stove & Range Co., 221 U. S. 418:**

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt, the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

If these announced principles are correct, then the procedure herein is wrong.

This Court further said in the **Gompers** case:

> "The complainants made each of the de-

> fendants a witness for the company, and, as such, each was required to testify against himself,—a thing that most likely would not have been done or suffered by either party had they regarded this as a proceeding at law for criminal contempt, because the provision of the Constitution that 'No person shall be compelled in any criminal case to be a witness against himself,' is applicable not only to crimes, but also to quasi-criminal and penal proceedings."

If this Honorable Court was right in saying that in contempt proceedings Constitutional limitations are to be observed, then the procedure invoked herein to deprive petitioner of his liberty is unquestionably a violation of the Constitution.

If this proceeding is consonant with the dignity, decorum and orderly administration of justice in Federal Courts, then Constitutional guaranties are like a German Treaty, a mere scrap of paper, to be trampled upon by the Courts, its constituted guardians, whenever the wounded vanity or injured pride of the sitting judge may dispose him to exercise harsh, arbitrary, and unbridled authority.

The evil of not requiring such proceeding to be conducted with decorum and in an orderly and judicial manner was never more apparent than in the instant case. There being no formal charge filed or presented against the defendants, the Court refusing a formal trial, in remanding them to jail assails them upon matters entirely different from the writing

of the letter, matters clearly not within the knowledge of the Court, nor committed in his presence, and upon which he heard no evidence whatever, and the harshness of the sentence is plainly based on these other considerations.

That the constitutional right of trial by jury does not exist in contempts committed in the face of the Court, or contempts so near thereto as to obstruct the administration of justice, does not signify that the other protective provisions of the Constitution can all be ignored. The right of jury trial in such instances did not exist at common law, for the very simple reason that at common law the right of the accused to purge himself of contempt by his oath was held inviolate, and the facts set forth in his oath were not allowed to be disputed, but were taken as true; therefore, at common law no issue of fact could ever arise in a contempt case. But this very reasoning impels the conclusion that the other guaranties of the Constitution do apply to such criminal prosecutions. To deny the right of trial by jury because at common law the defendant's answer could not be controverted and no issue of fact be raised thereon, and then deny the defendant the right to answer is to stultify both the common law and sound reason and violate the Constitution.

It is not liberty to say that a King cannot imprison in jail it is a distinction without a difference. without trial, and then say a judge can. To the man

The Supreme Court of the United States, in the case of **Ex Parte Robinson, 86 U. S. 505; 22 L. ed. 205,** granted a writ of mandamus to the Judge of the District Court for the Western District of Arkansas, requiring him to restore the petitioner's name to the roll of attorneys. His name was stricken from the roll by the judge for an alleged contempt committed in open Court. He had been cited by the Judge by rule to show cause why he should not be punished for contempt in connection with an alleged evasion of process of the grand jury by a witness. He appeared in Court in response to the rule, whereupon the Court informed him that his answer to the rule must be in writing; he stated that the rule did not so state, and thereupon it was ordered by the Court amended to require him to answer in writing and under oath, whereupon petitioner answered: "I shall answer nothing," which the Judge asserted was in an angry, defiant, and disrespectful manner and tone, and that he regarded "the words and the tone, and the manner in which they were uttered as grossly and intentionally disrespectful, and as an expression of an intention to disobey and treat with contempt an order of the Court, and believing that the Petitioner intended to intimidate him in the discharge of his duty, he felt it due to himself and his office to inflict summary and severe punishment upon the petitioner.'

The Supreme Court said, speaking through Mr. Justice Field:

"Before a judgment disbarring an attorney

is entered, he should have notice of the grounds of complaint against him, and ample opportunity of explanation and defense. This is a rule, of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. And such has been the general, if not uniform, practice of the Courts of this country and of England. There may be cases, undoubtedly, of such gross and outrageous conduct in open Court on the part of an attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power maybe lodged."

Is a man's liberty of less value in the eyes of a Court than real or personal property, or the right to an office? If even in the case of gross and outrageous conduct in open Court, he "should be heard" before he is condemned to lose an office, what can be said in defense of summary deprivation of liberty of person without any, much less "ample" opportunity of explanation and defense? The Court has well said "this is a rule of natural justice," just the same Court later said that "such a judgment is not entitled to respect in any tribunal."

It cannot truthfully be said that the petitioner was afforded even a reasonable opportunity to be heard. He was arrested on an instanter writ of attachment, without notice of any charge against him, taken by the Marshal before the Court, where his efforts to gain a reasonable time to answer, the justice of which must be admitted by every fair minded man, and which was even consented to by the Government's counsel, was denied by the Court. Of what avail is summons or notice if the party is denied the benefit of the notice. As said by Mr. Justice Field: "A denial to the party of the benefit of the notice is to deny that he is entitled to notice at all and the sham and deceptive proceeding had better be omitted altogether."

In the case of **Hovey vs. Elliott, 167, U. S. 409**; the Supreme Court of the United States, speaking through Mr. Justice White, with respect to the power of the Courts of the District of Columbia to punish for contempt, says:

> "In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the Courts of the District of Columbia, notwithstanding the statute are vested with those general powers to punish for contempt which have been usually exercised by Courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a Court, possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer,

and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor and condemn him without consideration thereof and without a hearing on the theory that he has been guilty of a contempt of Court. The mere statement of this proposition it would seem, in reason and conscience, to render imperative a negative answer.

"The fundamental conception of a Court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever is, in the very nature of things, to convert the Court exercising such authority, into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

The following language of Mr. Justice Sayne in **Mc.Veigh vs. U. S. 78 U. S. 11**; though spoken with reference to the deprivation of property rights, is equally, if not more applicable to the deprivation of personal liberty, because the intent to throw every protection around the liberty of the citizen is far more evident in the Constitution than the intent to protect mere property rights. He says:

"The order in effect denied the respondent a hearing. It is alleged that he was in position of an alien enemy and could have no locus standi in that forum. The liability and the right are inseparable. A different result would

be a blot upon our jurisprudence and our civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And Mr. Justice Field in **Windsor vs. McVeigh, 93** U. S. 277, referring to the above language, says:

"The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructice, to a valid judgment affecting his rights is admitted. Until notice is given the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of the notice would be in effect to deny that he is entitled to a notice at all, and the sham and deceptive proceeding had better be ommitted

> altogether. It would be like saying to a party 'Appear and you shall be heard' and when he had appeared saying, 'Your appearance shall not be recognized and you shall not be heard.' It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

This noble language of Mr. Justice Field condemns the procedure in the instant case so completely that it seems to have been written for this case; and with reference to the above quoted language Mr. Justice White said in **Hovey vs. Elliott:**

> "This language but expresses the most elementary conception of the judicial function."

In **Galpin vs. Page, 85 U. S. 8 Wall, 350,** the Supreme Court said:

> "It is a rule as old as the law, and never more to be respected than now, that no one is to be personally bound until he has had his day in Court, by which is meant that he has been duly cited to appear, and has been afforded opportunity to be heard. Judgment without such citation and opportunity wants all the attibutes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

In re Holt, 55 N. J. L. 384, the defendant was charged with a contempt consisting of a libelous publication against the Court, and an attachment was issued without affidavit or proof, the Court simply acting on its own motion, and thereupon the defend-

ant was taken into custody and gave bail and thereupon moved to set aside the attachment as illegal and unproved, which the Court refused, and proceeded without further proof to adjudge the defendant pay a fine of $1,000 and costs and be imprisoned until the payment thereof, and this being appealed.

Beasley, C. J., said:

> "The members of the Court were the accusers, witnesses and Judges; they took no testimony but convicted the defendant from their own intuitive knowledge. It is not necessary to say that such a course had not, in any respect whatever, the least semblance of a proceeding in a Court of Law."

And **in re Pittman, 1 Curt. (U. S.) 186,** after speaking of the criminal nature of the process in contempt of Court, Curtis, J., said:

> "The character of the proceeding should not be lost sight of, and especially it should not be so varied as to deprive the party proceeded against of any substantial right. Now one of the most important privileges accorded by law to one proceeded against for contempt is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact by any other evidence."

The due administration of justice calls for the exercise of Justice on the part of Courts, and their dignity and public respect for their judgments demand

that they proceed, especially where they are personally interested, with decorum, assuring the defendant every time honored right to present whatever he or his counsel deem necessary or expedient in defense or mitigation of the offense charged. The harsh, arbitrary, and unseemly manner in which the Judge below proceeded in his endeavors to vindicate his own injured personal pride, denying the defendants all those rights which fair-minded men would at once accord them, no matter how guilty, is far more detrimental and injurious to public respect for the Courts than any private letter counsel might write to a Judge in the heat of anger or feeling of outraged justice.

A Court cannot expect public respect for its decrees and judgments when it renders them in a manner that does violence to those fundamental principles of justice which are deeply imbedded in the Anglo-Saxon nature.

The Court would not permit counsel to explain even orally the circumstances under which the letter was written, and it is not even proven that the letter is correctly copied in the charge. Counsel did state that he dictated the letter with the friendly intention of relieving the judge of embarrassment in the trial of the cases. It starts out with the assertion that it is written "as a friend to the Judge of the Court," and when counsel attempted to show that his intentions were friendly the Judge said "it maked no

difference how friendly." This is a cruel sentence which had better been left unsaid.

Lord Bacon has well said:

> "Those friends are weak and worthless that will not use the privilege of friendship in rebuking and admonishing their friends with freedom and confidence, as well of their errors as of their danger."

If this method of procedure is permitted, then there are no restrictions whatever on Federal Judges in the matter of punishing for contempt. The individual's liberty is as precarious as it was before Magna Charta was conceived.

The Appellate Courts have always exercised the right to review in contempt cases. The Supreme Court even has frequently taken jurisdiction on original writs of habeas corpus on account of the importance of the matter. Therefore, if this right to review is to be intelligently exercised by the higher Courts, there must be a trial conducted in accordance with the usual and customary methods and some record made, which an upper Court may review. To strike out defendants' sworn answer, to refuse to hear evidence, to alter the record after appeal taken is not only to infringe defendants' rights but infringes the jurisdiction of the Court of Review.

Art. 1245d U. S. Comp. Stat. 1918, states that "Contempts committed in the presence of the Court, or so near thereto as to obstruct the administration of

justice, may be punished in conformity to the usages at law and in equity now prevailing." Congress recognizes that there are particular usages at law and in equity then prevailing with respect to the punishment of such contempts. If the Judge could punish at his will Congress would not have mentioned the usages and customs whereby such causes are tried and punishment inflicted. It has never been held that the Court could summarily commit to prison, without a charge or affidavit being filed, notice to the accused, an opportunity to purge himself by answer, and the introduction of evidence showing guilt.

The record conclusively shows that no fair opportunity was given the defendants to answer the charge; they were not allowed to plead, or consult counsel, although the Court had prepared for ten days for the prosecution, and employed a special prosecutor from Dallas; had set the stage as it were, and then sends out his Marshal, hales the defendants before him in custody, without service of any notice of the charge upon them, and when they attempt to make even a verbal motion for time to plead are repeatedly interrupted and refused hearing, as witness the following:

Mr. Cooke:

"I am now stating my good faith.

Judge Wilson:

"I mean this, that the Court is not permitting it stated—you may if you regard that as proper you may state it in your bill or exceptions in concluding the record."

Then without permitting him to state his good faith he was hustled off to jail and held in communicado, not permitted to telephone or consult counsel, and when after release he files such sworn statement it is summarily striken from the record.

Mr. Cooks:

"That affiant had heretofore been on friendly relations with the said Judge James C. Wilson—Judge Wilson. That is a matter that is wholly immaterial here, it don't make any difference how friendly.

Mr. Cooke:

"I am stating my good faith in writing the letter. And affiant believed in writing said letter he would relieve the said Judge of the embarrassment of filing the necessary statutory affidavits of disqualification, and if said letter—"

Here affiant was intending to state, as he did later in his formal answer and motion in arrest of Judgment, that if said letter contained any language to which the Judge did or could take exception to it was due to the fact that affiant dictated same hurriedly and depended on his law partner, Mr. Dedmon, to read same after it was transcribed, and Mr. Dedmon being suddenly called to Austin, while affiant was absent laid the letter back on affiant's desk without reading it, and on Saturday morning, just before nine o'clock affiant having an engagement in the District Court of Tarrant County, hurriedly sealed the letter, marked it personal, and handed it to Mr. Walker to

deliver, affiant going immediately to the County Court House. (It must be noted that up to that time the defendant had not even seen said letter or the charge brought. It was later read by the District Attorney), but here he was again interrupted:

Mr. Cooke:

I am going to state why I did not proceed—
Judge Wilson:

That does not constitute any defense to this contempt charge.

Mr. Cooke:

May I put in about writing the letter? May I put that in later?
Judge Wilson:

You may."

After the incarceration incommunicado of the defendants they were not permitted to put it in later.

They filed their answer in full in connection with motion in arrest of judgment immediately after their release from custody; they also filed a stipulation of counsel that it might be included in the record before this Court. The only object of getting the permission to file it later was that upon review this Honorable Court might be advised of the facts. After the appeal was perfected Judge Wilson scratched out of the stipulation of counsel (item e Rec. P. 89) this answer and motion in arrest of judgment, and directed the clerk to omit it from the transcript to be filed in this Honorable Court.

We believe that a Court attempting to try defendants against whom the judge harbored such ill will as is exhibited in this proceeding is error in itself.

If there were no decisions and no laws a just man by nature would know that this procedure was wrong.

So far we have discussed the manner, form, and process by which the defendants were convicted and sentenced. This we confidently assert was not that "due process of law" as understood under the Manga Charta, the Common Law, or our own Constitution.

The sentence is a mere arbitrary edict without semblance of process of law, and if permitted to stand will tend to bring the courts into disrespect of the public and cause further legislative restriction of their authority.

No Offense Was Charged Upon Which to Base Petitioner's Conviction.

We desire, however, to consider whether the offense presumably chared constitutes a contempt of court at all under the restrictions placed by Congress on the power of Federal Courts.

Sec. 725 provides: "The said Courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of thetir authority. Provided that such power to punish contempts shall not be construed to extend to any cases, except the misbehavior of any person in their presence, or so

near there to as to obstruct the administration of justice."

A commitment for contempt is void for excess of power; the punishment being imposed for supposed perjury alone without reference to any circumstances or condition giving to it an obstructive effect.—Ex. **Parte Hudgins, 39 S. Ct. 337, 249 U. S. 378, 63 L. ed 656.**

The Honorable Circuit Court of Appeals for the Fifth Circuit in its opinion herein filed says:

> "While the statute provides a method for disqualifying a judge there could be no impropriety in addressing a judge in a proper way, to secure his voluntary retirement. The propriety of the letter depends upon the language used by the writer in addressing the judge. Language, appropriate in an affidavit of disqualification, might not be used with propriety in a private letter addressed to the Judge."

Is it possible that citizens are to be incarcerated in jail for thirty days upon a mere question of propriety of certain conduct? The wisest judge once said, "If thy brother offend, rebuke him." The Circuit Judge says now: "If thy brother on the bench offend, say nothing to him, lest it be considered an impropriety and you go to jail, but you may safely publish the facts to the world." Good men and honest may be as far apart as the poles on a question of propriety, but crime is based primarily upon criminal intent coupled with a criminal act.

The Honorable Circuit Court of Appeals further defines the offense, as relied upon by the Government as follows:

> "The part relied upon by plaintiff as constituting the contempt is the statement that prior to the trial of the recent case of his client, Walker, the writer had believed Judge Wilson big enough and broad enough to overcome the personal prejudice against his client, which he knew to exist, but that the trial of that case had convinced him that he had been mistaken in entertaining that belief; that his client had desired but had not obtained the privilege of stating his answer to the slanders that had been filed in Court, and whispered in the ears of the Judge Wilson against him; that the writer's hopes in this respect had been rudely shattered, and his confidence in Judge Wilson destroyed, and he was for that reason voluntarily appealing to Judge Wilson to voluntarily disqualify himself in the other cases of his client." (Rec. p. 172.)

The learned Circuit Judge then proceeds:

> "At the time of the delivery of the letter, it appears from the recital that Judge Wilson was still to be called upon to hear the motion for a new trial in the case which had just been tried, and also certain bankruptcy proceedings, all of which had proceeded too far for an exchange of udges. The natural tendency of the letter was to destroy the calm and dispassionate consideration by Judge Wilson of the pending matters, which it was his duty to give."

The best answer to this reasoning is the very forceful language of Mr. Justice Holmes in the **Toledo Newspaper Co. Case, 247 U. S. 402:**

> "But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty."

In that case because the publications were made to the public generally and were likely "to arouse distrust and dislike for the court," and prevent obedience to its decrees if rendered, it was deemed sufficient to justify an information and fine, though after a formal trial.

In this case the Circuit Court of Appeals says because, to avoid publicity, counsel's position was communicate personally and privately, even unknown to his client, it would prevent one supposed to have dignity, poise, and power requisite for a high judicial office, from calmly considering matters which the letter itself acknowledged his full right to pass upon, with every assurance that no steps would be taken to disqualify him therein.

Indeed has a high office fallen into low repute if the occupant must be so zealously guarded from injury to pride or feelings. The truth is flattery and praise, so freely expended by some is more likely to influence action and interfere with justice but no one ever thought of punishing for contempt one who

pours honey in the judge's ears, but the **truth** spoken with candor merits immediate and summary imprisonment, even though spoken as a friendly rebuke.

The purported letter itself does not charge the Judge with anything which would or could be considered as a threat or intimidation as charged. The letter assets that it is written by the lawyer "as a friend of the judge of the Court." It relates entirely to matters not even set for trial and in which the Judge was subsequently disqualified by affidavit to try same in strict accordance with the statute. Therefore, as he can enter no future orders in any of the cases made the subject of the letter, and evidently was not expected to do so, the letter could not "obstruct the administration of justice" in any of said causes. The Judge seems to infer that the letter being delivered (as he claims) during a ten minutes recess in the trial of another case, not in anywise connected either with the letter or the defendants, it tended to obstruct the administration of justice in that case, but it could hardly be suggested that the letter would so far upset the Judge as to prevent him fairly continuing the trial of an entirely foreign case then pending. To even think so is to ascribe to him a lack of self-control wholly incompatible with the dignity of his position. It is apparent from the letter that counsel never expected the Judge himself to pass upon any of the cases made the subect of the letter. The Judge asserts that it is his view that the letter was intended to "destroy the very fairness an impartiality" of the Judge acting on certain motions

for rehearing which were not the subect of the letter.

The letter was not written about these at all, but to save any doubt, the letter asserted that no question as to his right to pass on these other matters was raised—in other words, his absolute right to pass upon them was conceded, and the letter merely referred to them so as to make it clear that his right to pass on same would not be raised, but on other cases he would be disqualified in the statutory method unless he voluntarily exchanged benches or disqualified himself. Is there anything in this that could have the effect of intimidating the Judge or obstructing the administration of justice? To hold so would be to hold the Judge to be of very weak character indeed. Certainly no intention to intimidate could be imputed to the writer. He did not expect a favorable decision in any matter, nor did he ask or seek such. He merely sought his voluntary disqualification in future matters, conceding his full right to act upon any pending or unfinished matters. Certainly it is not right for the Judge to suppress the evidence tendered by defendant as to his intent and motives and then conclusively presume motives far from his mind. It would be just as logical and just as fair to assume that these contempt proceedings were instituted to intimidate the lawyer from performing his sworn duty to his client to disqualify the Judge in the statutory method, as to assume that the letter was intended to intimidate the Judge. Certainly, the contempt proceedings did not have the effect of intimidating the lawyer, as disqualifying affidavits were

immediately filed in all of the cases mentioned in the letter as soon as he was released from custody and it does not appear wherein the letter intimidated the Judge, as he promptly overruled all motions for rehearing on the other matters pending.

In the case of the **United States vs. Craig, 279 Fed. 900,** the defendant was committed for writing a letter in which numerous serious charges against the judge were made reflecting upon the handling of a receivership proceeding then pending. A fair trial was had on information filed by the District Attorney, defendant was represented by counsel and testified in his own behalf, but was convicted by the trial court and committed with the proviso that he might purge himself by filing an unqualified retraction of the alleged false charges with the clerk.

A Judge of the Circuit Court of Appeals for the Second Circuit in exparte **Craig, 274 Fed. 185,** released the defendant on writ of habeas corpus, stating in his opinion as follows:

> "It will be observed that the entire letter refers to the denial of the application to appoint a co-receiver. The purport of the letter, taken as a whole, is a criticism of the District Judge who denied the application. * * * **In determining whether the language used was or was not a contempt regard must be had not merely to the very words used but to the surrounding circumstances in connection with which they were used.** In constructive contempt, such as is charged here, where the

language used is not per se libelous, or is fully capable of innocent meaning, the intention of the offending party is a factor and may control. So where the publication complained of can have no tendency to prejudice the case, the publisher may not be found guilty of contempt. To vindicate the dignity of the court in compelling respect and obedience a judge may best demonstrate his title to respect by keeping within the confines of judicial obligation and not reaching out beyond his powers to visit punishment upon another official who acts within the limit of what he conceives to be his duty and who atempts, whether inadvisably or otherwise, to secure some means of keeping his employer advised by right of access rather than favor of access to papers and information concerning the railroad properties. There is no divinity about the office or duties of a judge that makes him free from criticism. The statute required a misbehaviour which causes an obstruction of the administration of justice. It is well settled that where his contempt is committed without the presence of the court, every reasonable doubt will be resolved in favor of the accused. The charge is quasi criminal. By no interpretation can the letter be said to have any tendency to embarrass or influence the court so far as to prevent a fair trial or a just conclusion in regard to any matter which was then pending before the court. To have adjudged this misbehavior, so near the presence of the court as to obstruct the administration of justice was to exercise power beyond the jurisdiction of the district judge."

"The rule throughout, relied upon by the ac-

cuser is the Toledo Newspaper case. There the court imposed punishment for newspaper publication. This was done on the ground that the publication obstructed justice. It was a very extreme case. It consisted of continuous and protracted attacks upon the judge. The Circuit Court of Appeals stated (237 Fed. 986) upon this record the publications had reference to pending judicial action and there is a finding of fact that they tended and were intended to provoke public resistance to an injunctional order if one should be made and to intimidate, at least unduly influence the district judge with reference to his decision in the matter then pending before him.

"He stands convicted upon the letter alone and such inference as may be drawn therefrom. His conviction rests upon an issue between the court and the defendant and it is one of terminology and interpretation. There is no criminal intent discoverable from this record to support interpretation that was placed upon it by the court, nor was there pending sub judice a proceeding before the court at the time the letter was written. The conclusion is irresistable that the court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty. The petition for discharge is granted."

While this decree releasing Craig on writ of habeas corpus was reversed by the Supreme Court it was merely upon the ground that, instead of appealing from the contempt decree, Craig availed hisself of the wrong remedy.

In the letter under consideration, it is plainly evi-

dent that the sole intention of the writer was to induce the judge to note his disqualification in all of the cases made the subject matter of the letter. None of these cases had been set down for trial. In the three rehearings which were pending before him, it was expressly stated in said letter that his right to pass upon said pending matters would not be in any wise questioned. The judge in the court below takes the position in his inquisition of the defendant, Cooke, that the attempt to procure his disqualification was not in the statutory manner. He loses sight of the fact that prior to the trial just concluded his deep seated prejudice by reason of which as stated by him, he "questioned his own qualification" was known only to himself, and the due administration of justice required, not that the defendant proceed in a statutory manner to procure his disqualification, but that he voluntarily recuse himself. Nothing is so obstructive of the administration of justice in the courts as bias and prejudice on the part of the presiding Judge. Prejudice and justice cannot exist in the same mind at the same time, because they are utterly antagonistic mental qualities. Therefore, since the judge admits that he, "was biased and prejudiced," that this was based upon heresay, his sitting in the case was in itself more an obstruction to justice than any protest thereof could in any wise be. Therefore, the only effect of the letter, the only purpose of the letter was to procure the due and proper administration of justice in behalf of the defendant and to preclude and prevent the personal bias and prejudices of the judge

so developed over a long period of years and admitted by him to exist from intervening itself between the property rights of the defendant and the eternal principles of justice. It cannot be without proof presumed conclusively that the letter was written for the purpose of obstructing the administration of justice, nor can it be conclusively presumed that it did obstruct the administration of justice. Its effect might more properly be held to effect the administration of justice rather than to obstruct it. However, uncomplimentary of the personality of the judge it may be it was not libelous per se nor did it pertain to any matter so far as the disqualification of the judge was concerned then pending or which the defendant ever proposed would be pending before the district Judge.

The Proverbs say:

> "He that rebuketh a man afterwards shall find more favor than he that flattereth with the tongue."

The letter itself shows that it was written in a friendly spirit, however, unfortunate the wording may have been.

A sentence imposed for an offense not charged is void. 16 C. J. 1303.

It is plain from the Court's own statement that the offense he had in mind in fixing the penalty was not the writing of the letter so much as it was certain matters believed to be contained in defendant's pleadings, else why does he direct such pleadings included

in the record, and then when they do not support his allegations direct that they be omitted; and for watching the Juror Thomas after he left the court house.

There is no single principle so well settled in criminal jurisprudence, or which appeals more strongly to the inate sense of justice in every man, than the principle that the accused is entitled to know definitely the charge against him, and is to be tried and sentenced on no other. The entire proceedings lead to the inevitable conclusion that the Court desired to punish defendants for shadowing Thomas, and from questioning the operations of the Trustee and Referee in Bankruptcy, and at the same time prevent any record being made which this Court could review.

He received the letter ten days before he moved to punish the alleged "obstruction of justice," but he moved immediately after he got the detective's affidavit.

We confidently assert that (1) No offense is charged against petitioner; (2) No offense is proven against him; (3) No trial has been had; (4) No legal sentence pronounced.

He is deprived of his liberties without due process of law; fundamental safeguards denied him and even the right of review emasculated.

Wherefore, we pray that the writ of certiorari applied for be granted.

Respectfully submitted,

J. A. TEMPLETON,
G. A. STULTZ,
W. E. SPELL,
CHAS. A. BOYNTON,
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Supreme Court of the United States

OCTOBER TERM, 1924

No. 311

CLAY COOKE, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF PETITIONER

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INDEX

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BRIEF ON BEHALF OF PETITIONER

—o—

Statement of the Case

On the 26th day of February, 1923, the Clerk of the District Court of the United States for the Northern District of Texas, Fort Worth Division, issued a writ of attachment directed to the Marshal of said District commanding him to attach the bodies of Clay Cooke, an attorney, and J. L. Walker, his client, and to have them before the District Court of the United States, at the city of Fort Worth, Texas, *instanter*, then and there to show cause why they should not be punished for criminal contempt (R.

p. 4). Said writ did not disclose what the accusation was, nor at said time was there on file or on any record of said court any charge against petitioner.

The Marshal executed said writ, as shown by his return, as follows:

> "Received this writ the 26th day of February, 1923, and executed the same on the 26th day of February, 1923, by attaching the bodies of Clay Cooke and J. L. Walker and taking them before the Honorable James C. Wilson, U. S. District Judge, at Fort Worth, Texas, who ordered them to jail for thirty days." (R. p. 4.)

There was no affidavit for contempt filed, nor any other authentic charge, nor was there served on petitioner any notice of the nature of the complaint against him. There appears, however, in the record as sent up by the clerk what was evidently intended to be the charge against petitioner (R. p. 1-4).

This document, which is styled "Statement of Facts" (R. p. 1), purports to charge petitioner and his client, J. L. Walker, with contempt of court in writing and causing to be delivered to the Judge of the Court, in Chambers, a letter copied in said purported charge as follows:

"Fort Worth, Texas, February 15, 1923.

Honorable James C. Wilson,
Judge U. S. District Court,
Fort Worth, Texas.

Dear Sir:

In Re No. 985, W. W. Wilkinson, Trustee, v. J. L. Walker

In Re No. 986, W. W. Wilkinson v. Mass. Bonding Co. et al

In Re No. 266-Equity, W. W. Wilkinson, Trustee, v. J. L. Walker

In Re No. 69-Equity, Southwestern Telegraph & Telephone Co. v. J. L. Walker

In Re No. 1001-In Bankruptcy, Walker Grain Company

Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg, personally as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters, and as a friend of the Judge of this Court, to suggest that the only order that I will consent to your Honor's entering in any of the above mentioned matters now pending in your Honor's Court is an order certifying your Honor's disqualification on the ground of prejudice and bias to try said matters.

You, having, however, proceeded to enter judgment in the petition for review of the action of the referee on the summary orders against the Farmers & Mechanics National Bank, and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, v. J. L. Walker, you will, of course, have to pass upon the motion for a new trial

in said cause.

I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind as a lawyer and an honest man is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for your Honor to do in the above styled matters is to note your Honor's disqualification, or, your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just concluded, I had believed that your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this hope I was mistaken; also, my client desired the privilege of laying the whole facts before your Honor in an endeavor to overcome the effect of the slanders that have been filed in your Honor's Court against him personally and which have been whispered in your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in your Honor's Court.

My hopes in this respect having been rudely shattered, I am now appealing purely to your Honor's dignity as a judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment your Honor's pleasure with respect to the matters herein presented, so that further steps may be avoided.

With very great respect, I beg to remain,

Yours most truly,

(Sgd.) CLAY COOKE." (R. p. 2.)

There was a series of cases in which the said Walker was interested pending in the United States Court at Fort Worth, growing out of certain bankruptcy proceedings and certain proceedings in bankruptcy involving the recovery of certain alleged preferences, etc. (R. p. 15), one of which, namely Wilkinson as Trustee of the Walker Grain Company, bankrupt, brought against said Walker as defendant, sought to recover $85,000.00 alleged to have been paid by the bankrupt upon certain promissory notes (R. p. 5), upon which Walker was surety, which, according to the Court "the Jury after deliberating earnestly for the larger part of two days" returned a verdict for the plaintiff in the sum of $56,484.65 (R. p. 6). The Court, in its statement of facts, had "submitted the dceision of the case entirely to the jury without comment or expression of opinion by the Court, but on the other hand, *specially instructing the jury to disregard any opinion the jury might feel the Court entertained as to the facts*, and to reach their own conclusion and verdict *irrespective of the Court's opinion, if any had been expressed.*" (R. p. 6.) The jury in this case rendered its verdict on February 15, 1923.

According to the statement of facts prepared by the Judge, "on the following day at the hour of 11:15 A. M.," while the court was in a short recess from the trial of another case foreign to this controversy, he charges that "the said J. L. Walker and his attorney of record, Clay Cooke, Esquire, were guilty of misbehavior in the presence of the Court

or so near thereto as to obstruct the administration of justice by delivering by the hand of said J. L. Walker to the Judge of this Court, Judge James C. Wilson," in the Judge's Chambers, the letter hereinbefore referred to (R. p. 6).

In the Court's statement of facts it appears "the said Clay Cooke and said J. L. Walker both being present at said time and place" (R. p. 6). This evidently means that the said Cooke was technically present for the reason that just prior thereto the Court in its statement says that the letter was delivered "by the hand of said J. L. Walker" (R. p. 6). That the petitioner was not present when the letter was delivered to him by Mr. Walker for delivery appears from the statement made in open Court. (R. p. 14.)

Eleven days after the letter was written and ten days after its receipt, according to the Judge's statement, the Judge, on, to-wit February 26, 1923, ordered "that an *attachment immediately issue* for the said J. L. Walker and Clay Cooke, and that the Marshal of this Court *produce them instanter* before this Court" (R. p. 4), which, according to the Marshal's return, was executed on said day (R. p. 4), the petitioners being brought into Court at 11:00 A. M., at which time, the Court announced that he would call the contempt matter and makes this significant statement:

> "I have requested Judge J. M. McCormick of Dallas to be present and act as a friend of

> the Court in this proceeding, and have also requested the District Attorney, it being in its nature a criminal matter, to act." (R. p. 9.)

Up to this time, there is nothing in the record to show that defendants were advised of the charge. Petitioner advised the Court that he received his first notice of the proceeding about an hour previous and tried to arrange for counsel, and asked to be allowed the benefit of counsel and an opportunity to consult them, which was denied by the Court (R. p. 9-10). He then requested time to prepare and file an answer, which was also denied by the Court (R. p. 10-11), the Judge stating:

> "Unless you desire now to state that you have some defense you care to file and present, and indicate what that defense is to this charge, then I shall direct that this proceeding go forward. * * * Now if you have any defense that is pertinent to this order, state what it is." (R. p. 11.)

Under these most trying circumstances, and confronting the Court without counsel, the petitioner renewed his request that he be permitted to have the benefit of counsel and an opportunity to properly answer the charges to show a lack of intention of disrespect to the Court, that the letter was written as a friend of the Judge to avoid placing upon the record an affidavit of bias and prejudice, but he was repeatedly interrupted and prohibited by the Court from even dictating to the Court

stenographer such statement except in a manner agreeable to the Court (R. p. 11-15).

As illustrative of these interruptions by the Court, the following among a number of others appears in the record:

> "Mr. Clay Cooke: I am now stating my good faith.
>
> Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record.
>
> Mr. Clay Cooke: That affiant had heretofore been on friendly relations with said Judge James C. Wilson—
>
> Judge Wilson: That is a matter that is wholly immaterial here, it don't make any difference how friendly.
>
> Mr. Clay Cooke: I am stating my good faith in writing the letter. And affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of filing the necessary statutory affidavits of disqualification, and if said letter—
>
> Judge Wilson: Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.
>
> Mr. Clay Cooke: I am going to state why I did not proceed—
>
> Judge Wilson: That does not constitute any defense to this contempt charge.
>
> Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

Judge Wilson: You may." (R. pp. 12-13.)

* * * "That affiant never made public to any one whatsoever the contents of said letter and did not intend the contents for any one except the Judge of this Court, and for the friendly purpose of relieving affiant any embarrassment in the trial of cases then pending in the Court, and if possible to relieve His Honor of any embarrassment incident to the trial of said cases, which would necessarily arise in view of the condition of the mind of affiant's client and of other parties involved in the litigation. The purpose of the letter was most friendly. That affiant has always upheld the dignity of our Courts and has upheld in all previous controversies, the fairness of the Judge of this Court, and has had numerous strong arguments—

Mr. McCormick: We object to the innuendo that this Court has been the matter of discussion.

Mr. Clay Cooke: We would like to add here that affiant says he has been unable to consult with counsel; that if any one is guilty of contempt it is affiant solely, and that his client, J. L. Walker, is not apprised of the contents of said letter, more than that affiant would endeavor to get the Court, by a private, personal communication, to exchange with some other judge to try the matters in which affiant's client was involved.

That affiant now here requests the privilege of a delay of not less than one day, and three days if possible, in which to prepare and present to this Court evidence of extenuating circumstances; evidence of a lack of any intention to commit a contempt of this Court; evidence of the good standing and record of affiant at the bar of Texas and other Courts

and at the bar of other states during the past fifteen years, and other evidence proper to be heard in a trial of this character, where affiant's standing and reputation and where his practice is involved, and his right to practice in a matter of this kind, and affiant respectfully prays for not less than one day's time and three days if possible, to present his defense, and also to present the extenuating circumstances which might appeal to the conscience of the Court, in case the Court can not be convinced from other evidence that no contempt was intended and none was committed.

Also affiant desires to investigate and his counsel to investigate the law for presentation to the Court, as to whether a personal private letter delivered to the Judge, setting up affiant's position with regard to litigation, and his client's position with regard to litigation, constitutes in law a contempt of the Court." (R. pp. 13, 14.)

Thereupon for the first time, the order of arrest was read to petitioner at the direction of the Court by the District Attorney (R. p. 14), whereupon petitioner moved the Court as follows:

"Mr. Zweifel (to the defendants, Cooke and Walker): Stand up.

Mr. Clay Cooke: To which the defendants move first, as they have moved, for a postponement and for time within which to plead and for time within which to employ counsel, as heretofore requested.

Judge Wilson: The motion is overruled." (R. p. 14.)

* * * * * *

"Defendant excepts to the action of the Court as shown by the foregoing record in refusing to permit them any time to consult counsel or to plead in answer to said rule to show cause; that had defendants been permitted to consult counsel and answer or plead to said writ, defendants would have answered and did thereafter answer as shown by their answer filed in said cause." (R. p. 15.)

The Court thereupon of its own motion, stated that it would have inserted in the record the pleadings in two suits in which said Walker was a party, whereupon the petitioner requested that there also be inserted in the record the evidence in one of the cases, which the Court promptly stated would be excluded, to which action the petitioner excepted (R. p. 15).

While the basis of the Court's charge of contempt against petitioner was the letter written eleven days prior to the date of citation and the hearing, it is apparent from the record that other reasons actuated the Judge in ordering the instanter order of arrest and the judgment of contempt, as appears from the following:

"And I have some more things I should like to remind you gentlemen of, your conduct and course as litigant and as an attorney of this Court, in many respects, has been reprehensible. You have filled your pleadings with scandalous charges against trusted officials of this Court. You have charged that the Referee in Bankruptcy, the attorneys for the petitioning creditors and the Trustee in Bankruptcy en-

tered into a corrupt conspiracy to do many unlawful things all to deprive you, J. L. Walker, of your rights, in this Court. And not only that, but while the jury were deliberating in cause No. 984, and though in charge of the Marshal of this Court, you, both of you being a party to it, employed a private detective to follow and shadow them with a view of reporting to you any corrupt conduct on their part; and you, J. L. Walker, after the jury had rendered its verdict of fifty-six thousand dollars against you, you employ this same detective, whose sworn statement I hold in my hand, to follow the foreman of the jury, Mr. E. G. Thomas, an honorable and respected citizen of Tarrant County, stating that you expected him to meet some one and be paid off, in other words, to receive bribe money for his verdict in said cause. And not only that, but you gave this same private detective to understand, that another one of the jurors, an honorable citizen of Parker County, had been improperly approached and influenced as a juror in this case—

Mr. J. L. Walker: Your Honor, pardon me, but I would like to state that J. L. Walker did but what he is in position to prove, and I have it in my pocket now—

Mr. Marshal, cause this man to desist.

Mr. J. L. Walker: I beg your pardon, I thought I had the right to speak now.

Judge Wilson: No, you haven't got a right. Your time to reply is passed.

In view of all this, it is not surprising that you men would deliver this letter to the Court with the utterly false statement in it that this Court had permitted himself to be improperly influenced and whispered to *and whispered to* by interested parties against a litigant in this

Court. It is a simple and easy matter to analyze the character of any man who is expecting every other man to act dishonestly and corruptly.

Your whole course, as I say, has been contemptible, not only in this matter, and it is not surprising that you delivered this letter to the Court and is surprising that you did not state more in the letter, and of course you are in contempt, if you are not, you have your remedy, and you, J. L. Walker, I sentence to the Tarrant County jail for thirty days and the payment of a five hundred dollar fine—" (R. pp. 15, 16.)

Upon delivering sentence against each of the defendants of thirty days in jail and a fine of $500.00, the Court was interrupted by the special counsel retained by the Court who directed his attention to the fact that the Court was exceeding his statutory right which limited the punishment to fine or imprisonment. Whereupon the Judge ordered that each be committed to jail for thirty days (R. p. 16).

Petitioner noted an appeal and the Court granted it, but fixed the appeal bond at $1,000.00 (R. p. 16). The Court declined to accept a bond to release the defendants, and ordered them to be taken to jail, where they were not permitted to communicate with counsel or friends until some friends on their own initiative perfected the writ of error and gave bond for petitioner's release (R. pp. 17, 18). The Court held that the only condition on

which he would release the petitioner on bond was that they should first perfect an appeal. The Court stated: "If they perfect this appeal, I might release them from jail—show that they are going to appeal it and do it in a hurry." (R. p. 17.)

Upon the release of petitioner from jail he immediately employed counsel, prepared and filed his verified answer, supported by affidavits, in the nature both of an answer and motion in arrest of judgment and for a new trial, and presented same to the District Judge for action thereon, but said Judge refused to act thereon one way or the other (R. p. 17). Petitioner then presented his petition, assignments of error, and bond for writ of error, March 19, 1923, which the Court approved and ordered substituted for the appeal papers approved and filed by petitioner's friends while he was held in jail incommunicado (R. p. 18). The assignments of error were prepared with reference to this verified answer or motion for new trial and in arrest of judgment (R. pp. 21-32).

Petitioner procured a stipulation (R. p. 49) signed by his counsel, by the U. S. District Attorney, and by J. M. McCormick, Esq., special counsel engaged by the Court to assist in the prosecution (R. p. 9) as to the contents of the record on appeal, which stipulation included, as a part of the record, said answer and motion, being item (e) thereof (R. p. 49), and petitioner also included same in his praecipe for preparation of the record (R. p. 50). After

these papers were filed, without the knowledge or consent of petitioner or his counsel, the Court directed the clerk to omit the same from the record on appeal (R. pp. 47, 44).

Petitioner filed in the Circuit Court of Appeals an application for certiorari to perfect the record by requiring the clerk to include said instrument, as required by stipulation of counsel and praecipe before it was altered (R. pp. 54-50). This motion was denied by the Circuit Court of Appeals April 5, 1923 (R. p. 50).

The Honorable Circuit Court of Appeals for the Fifth Circuit, by opinion rendered December 26th, 1923, reversed the sentence against petitioner's client, but affirmed the sentence against petitioner (R. pp. 51-57). The Court in its opinion holds that petitioner was entitled to a fair hearing on the question of his guilt or innocence of the charge, and further holds that petitioner may not have received the character of hearing to which he was unquestionably entitled, but bases its affirmance of the decree upon the assumption that a fair and legal hearing would not have benefited petitioner.

The Court of Appeals, however, holds in its opinion that this leave to file an answer after conviction, could not take the place of the duty of the Court to permit same and hear the defense before convicting the defendant, but declined to accord petitioner the benefit of this just and salutary principle, because said Court believed that a trial would not have benefited petitioner.

ASSIGNMENTS OF ERROR

First

The Court erred in denying petitioner due process of law, in violation of the provisions of the Constitution, in that:

(a) He was arrested without warrant of law, no affidavit, or other authenticated charge being filed against him.

(b) He was denied the assistance of counsel for his defense.

(c) He was not informed of the nature and cause of the accusation against him.

(d) He was not permitted to plead thereto.

(e) He was denied the right to produce witnesses in his favor.

(f) He was not confronted with any evidence or witnesses against him.

(g) He was incarcerated incommunicado and prevented from presenting, before appeal, his application for a new trial, motion in arrest of judgment, or consulting counsel with respect to said proceedings.

Second

The Court erred in denying and refusing petitioner the right of counsel and time to consult counsel with respect to the charge brought against

them, because the same is a right guaranteed by the Constitution and laws of the United States passed in pursuance thereof.

Third

The Court erred in entering the said judgment and sentence, in that the proceedings to effect the same, were in violation of Art. VI of the Amendments to the Constitution, in that the petitioner (a) was denied the right of a public trial; (b) was not informed of the nature of the charge against him; (c) was confronted with no witnesses against him; (d) was denied process for obtaining witnesses in his favor; (e) and was denied the assistance of counsel for his defense.

Fourth

The Court erred in holding that the writing of said letter and the delivery of same was a direct contempt upon which petitioner was entitled to no trial and no hearing.

Fifth

The Court erred in convicting petitioner of a contempt for writing the said letter, when the same had been delivered ten days prior to his citation therefor, and the record of said Court shows that petitioner was punished for other and different offenses, to-wit, the shadowing of a juror, because said charges were brought immediately after the

Court obtained evidence of the shadowing of said juror, and not upon the writing of said letter, and because the Court shows in its sentence that it is the offense of shadowing said juror for which petitioner was punished, and all of the evidence shows that this was the offense in the mind of the Court in imposing said punishment.

Sixth

The Court erred in denying petitioner his inalienable right at Common Law to purge himself of the charge of contempt by his oath.

Seventh

The Court erred in holding that there was anything in the said letter contained that could obstruct the administration of justice.

Eighth

No lawful trial was had and no lawful procedure was followed in obtaining said conviction.

Ninth

The trial Court erred in striking from the record, after writ of error to the Circuit Court of Appeals had been perfected, the answer of the petitioner filed therein, and in excluding the same from the record transmitted to the Appellate Court.

Tenth

The Circuit Court of Appeals erred in denying petitioner's motion for certiorari to bring up the complete record, including defendant's answer to the charge and the trial Court erred in striking this instrument from the record after appeal perfected, because:

(a) Same constituted good defense to said charge and should have been considered.

(b) Same was a part of the record on appeal, had been stipulated and designated as such and was arbitrarily stricken by the Court therefrom after appeal perfected without knowledge of the petitioner or his counsel.

Eleventh

The Court erred in hailing petitioner before the bar of said Court upon an instanter writ of attachment to show cause why he should not be committed for contempt of court in the writing of the letter set forth in said charge, and then, upon being presented at the bar of said Court, in refusing to permit him to show cause why he should not be committed, as shown by the record in said cause, the Court having summarily upon his presentation at the bar of said Court committed him to jail for contempt of Court, without a hearing, without the privilege of consulting counsel and setting up and showing his defense thereto.

ARGUMENT AND AUTHORITIES

Petitioner's conviction was obtained without due process of law.

(a) He was sentenced without any affidavit or other authentic charge being brought against him, or any notice of the offense charged.

The first signed or filed instrument of any character is the writ of attachment (p. 4), signed by the clerk, directing the Marshal to immediately seize the person of petitioner and bring him instanter before the bar of the Court "to show cause why he should not be punished for criminal contempt." There was no intimation of what the alleged contempt consisted. The only apparent authority of the clerk to issue this writ is the unsigned, unfiled, and unentered typewritten matter, styled "Statement of Facts" (p. 1). Evidently this was dictated by the Judge in Chambers and left with the clerk as the basis of the writ of attachment. It was not signed, filed, nor passed in open Court, and to this date does not appear on the minutes or other record of said Court. It is the only foundation upon which the whole proceeding rests. Is it sufficient basis upon which a warrant may issue and petitioner's person be seized and thrown into confinement?

Art. IV of our Bill of Rights provides: "The right of the people to be secure in their persons * * * against unreasonable seizure shall not be violated,

and no warrants shall issue but upon probable cause, supported by oath or affirmation, etc."

No oath or affirmation supports this warrant. No order passed in open court supports it. No signed instrument or charge of any character supports it. The purported charge does not pretend to be the act of the Court, but is merely a statement of alleged facts dictated by the Judge, not acting as a Court. Yet the warrant issues thereon, petitioner's person is seized thereon, and the whole proceeding rests thereon. At the very inception, this provision of our Bill of Rights is violated.

Phillips S. & T. Co. v. Amalgamated Ass'n., 208 Fed. 335.

Sona v. Aluminum Castings Co., 214 Fed. 936.

(b) Even this purported charge states no offense against the laws of the United States.

Art. 1245, U. S. Comp. Stat. R. S. 725, March 1, 1911, C. 231, S 268; 36 St. 1163, provides that "contempts committed in the presence of the Court or so near thereto as to obstruct the administration of justice may be punished in conformity to the usages at law and in equity now prevailing." The purported charge does not state by any positive averment that the writing of said letter obstructed the administration of justice. It merely purports to set forth the "views" of the judge of the court that same was impertinence and insult

to the judge of the court; it does not by positive averment charge defendant with any criminal intent to obstruct the administration of justice, but merely expresses the "view" of the judge that such was the intent and purpose (p. 1-4). In criminal prosecutions it is essential that the charge brought against the accused by positive averment state an offense against the law. Whatever "*view*" the judge might privately hold as to the purpose and intent in writing the letter, or his "*view*" with respect to the motives prompting same cannot constitute an offense against the laws, because no citizen can be held to answer for the "views" of another. He must have done something which violates an express prohibition of the law and he must have done it with criminal intent. Before he can lawfully be seized and convicted, the nature of the accusation must be set forth and brought home to him in positive averments. If everything in the purported charge were admitted to be true, it would merely mean that the Judge held certain private "views" as to certain private, confidential acts of the defendant, and these views might or might not be justified by the facts.

Exparte Hudgins, 249 U. S. 378.
Exparte Craig, 274 Fed. 185.

(c) Petitioner was not informed of the nature and cause of the accusation.

Even should this instrument be sufficient to charge an offense, no notice of it was ever given to peti-

tioner. No copy accompanied the warrant as required by law; it was not of record in the Court; it was never passed in open Court, nor entered on the minutes. Art. IV of the Bill of Rights provides that *"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation."* After petitioner's futile efforts to gain a little time to investigate the charge (pp. 9-12), it was read by the District Attorney (p. 14), and thereupon petitioner was immediately sentenced to thirty days in jail (p. 15). The information to which the accused is entitled is reasonable information, that is, such as would permit him to investigate and answer the accusation. In this instance after the reading of the charge to him he was immediately sentenced without even being arraigned, required, or permitted to plead thereto. This is not such notice as the Constitution intends, nor would it be sanctioned even in the case of the darkest offense or the most vicious criminal. It would seem that a reputable practicing attorney, whose only offense seems to be that, in an effort to obtain an unbiased Judge to try certain pending litigations of a civil nature, without embarrassment to himself or the Judge, he excited the Judge's wrath, should be accorded at least that same measure of Justice that those charged with heinous crimes are accorded.

Act of August 18, 1894, C. 301, Sec. 1, 28 St. 416, requires that a certified copy of the complaint be attached to every warrant of arrest, and that

the officer executing same shall take his prisoner before the nearest commissioner for a hearing and taking of bail for trial.

This statute was in no respect complied with. The petitioner was arrested on a warrant that neither charged an offense nor contained a certified copy of any charge, and was immediately committed to jail for 30 days.

Sona v. Aluminum Castings Co., 214 Fed. 936.
Gompers v. Buck Stove & Range Co., 221 U. S. 418.
Exparte Robinson, 86 U. S. 205.
Windsor v. McVeigh, 93 U. S. 277.
Galpin v. Page, 85 U. S. 959
In re *Holt*, 55 N. J. L. 384.

(d) Petitioner was denied the assistance of counsel for his defense.

No notice was given petitioner of the charge, though the trial Judge consumed ten days after receiving the letter in which it appears he engaged the services of a special prosecutor from another city, formulated the charge, prepared for the prosecution; then, after such careful preparation, a U. S. Marshal is sent out to bring petitioner under arrest instanter before the Court, where he is denied all reasonable opportunity to consult counsel, or to obtain the assistance of counsel for his defense.

Our Bill of Rights, Art. VI, further provides: "In *all* criminal prosecutions, the accused shall enjoy the right to have the *assistance* of counsel for his defense."

The fact that this is a criminal prosecution and that defendant was denied the assistance of counsel for his defense cannot be and is not denied. The Honorable Circuit Court of Appeals excuses in its opinion this infraction of a fundamental right by the assertion that the accused was an attorney himself. The Constitution does not say that in the event the accused is not a practicing attorney, he shall have the right to the assistance of counsel. There is no such dangerous exception in that document. Besides, the accused was in custody, the Marshal's hand was on him. He had more need of counsel than one of another profession charged with crime, because in other instances the accused would have been admitted to bail, his trial set, and he would have been given time to prepare for his defense; also in ordinary accusations, the accused is supposed to have the protection of the Court, whose first duty is to see that he gets a fair and impartial trial according to the due course of the law of the land. Here, the Court was the prosecuting witness, judge, jury, and executioner, and it is apparent that he was in such a frame of mind that he could not even permit the defendant to state his good faith in writing the letter. If ever accused needed, or was entitled to the benefits of the assistance of counsel for his defense, this was

one, if for no other reason than to endeavor to mollify the apparent injured pride of the presiding Judge to the extent that he might accord the defendant some slight measure of justice in the hearing.

The Honorable Circuit Court of Appeals also states that defendant had the assistance of his law partner, Mr. Dedmon. This is contrary to the facts. The record shows that after the Court had ordered the Marshal to take the defendants to jail (p. 17) Mr. Dedmon appeared for the first time, unknown to defendants and without even the opportunity of consultation with them, and while they were held in jail without even the privilege of consultation, prepared the appeal papers which were subsequently ordered out of the record and other appeal papers prepared by defendant's counsel after his release from jail substituted therefor. (Rec. p. 18.)

Besides it is the *assistance* of counsel that the Constitution guarantees. The right of counsel, even if granted, without the right of consultation is a barren and fruitless right. The arrest, the alleged hearing, the conviction and the incarceration of defendant all occurred in a very short space of time in the forenoon, and defendant during all of said time was in the custody of the Marshal or before the bar of the Court in custody, with no opportunity either to employ or consult with counsel. It is hard to believe that any Judge, in whose oath-

bound custody is committed the protection of these sacred fundamental and inherent rights, could so far forget their meaning or his duty as to try to construe the facts or action herein as a compliance with this provision of the Constitution.

What was the cause for the sudden hurry to get defendant in jail? Had not the trial Judge consumed eleven days after the commission of the alleged offense before he even brought the charge? If with the assistance of the District Attorney, he had not sufficient counsel to prosecute defendant, but had to engage special counsel from another city and bring them over, can anyone say that defendant was not entitled to at least one day or one counsel, or one hour of consultation?

But did any counsel appear for defendant? The record discloses that after petitioner's request for time to employ and consult counsel had been peremptorily overruled, after he was denied the right to plead to the alleged charge, after he had been sentenced to 30 days in jail, the following occurred:

> "Judge Wilson: Take these respondents to jail, Mr. Marshal.
>
> "Mr. McCormick: If they are going to take the full 60 days on the matter.
>
> "Judge Wilson: No, there is not going to be any 60 days, the higher court is going to pass upon this matter at once." (Rec. p. 17.)

And as the Marshal was taking defendant to jail he stated:

"We want to make bond." (Rec. p. 17.)

For the first time then it appears that Mr. Dedmon appeared and while petitioner was incarcerated in jail and with Judge Slay prepared the petition for writ of error and the bond therefor to obtain petitioner's release as a friendly act, without consultation with defendant. (Rec. p. 18.) Neither of these attorneys attended the alleged hearing or knew anything about the proceeding, nor did petitioner have the slightest opportunity to consult with them. This cannot be called, with any degree of fairness, that assistance of counsel intended by the framers of the Constitution. It is more nearly similar to the acts of the British Crown complained of as one of the reasons justifying our Declaration of Independence.

(e) Defendant was not allowed to plead to said charge, and the common law right to purge himself by his oath was denied him.

The statement of the case, supra, shows that defendant was even denied the privilege of dictating a motion for time to employ and consult counsel, investigate the charge and plead thereto. Immediately upon the overruling of said motion he is ordered to jail for thirty days. He was not arraigned or requested or required to plead to said charge, even orally; indeed the record shows that he was in truth and in fact convicted before the warrant was ever issued and there was never any

intention on the part of the trial Judge to permit him even to assert a defense. Because when he attempts to state his good faith, although the charge has not at that time even been read, the Judge stops him and states that he will not even permit his good faith to be stated, but that it might be incorporated in the record in concluding the bill of exceptions. In other words, the Judge announces the defendant's conviction before the charge is even read, and offers to incorporate whatever defense the defendant might have in the bill of exceptions in concluding the record (R. p. 14). It is not understood, in this state of the record, why the Judge did not in the first instance have the warrant to direct the Marshal to seize the person of defendant and hold him in jail for thirty days. Why go through the utter farce of bringing him into Court; no right or privilege was accorded him there.

It is apparent that the trial Judge did not desire to hear any defense, excuse, or extenuation whatever, and the Honorable Circuit Court of Appeals well says: "The permission of the Court given him to incorporate his defense in the record could not take the place of a hearing of his defense before the tribunal before which he was being tried." Yet that Court in affirming the sentence against petitioner, retracts its own principle thus laid down by saying: "A further and more deliberate hearing would have been of no benefit to him."

Is the conferring of benefits or the infliction of injuries any concern of Justice? Justice is or should be administered by Courts without regard to benefits conferred or injuries inflicted, but solely because it is Justice. As said by Seneca:

> "He who decides a matter without hearing both sides, though he may have decided right, has not done Justice,"

and this is spoken of by Blackstone as a "*rule of natural reason.*"

But the Honorable Circuit Court of Appeals says that though a just and fair hearing, such as petitioner was unquestionably entitled to, was not granted, even if it had been it would not have benefited him. It would at least have permitted the defendant while serving his thirty days in jail at the instance of that Government, which in time of war and stress demands and receives his loyalty and devotion, to feel that in return therefor the same Government is equally concerned to guard and protect his liberty and his lawful rights. A man convicted after a fair trial can with good grace accept and endure his punishment, *but a man punished without the semblance of a fair trial, by an angry Judge, in the heat of passion, for what is misunderstood by him to be a mere personal affront,* is injured by the procedure no matter how guilty he may be. It might well be said that a trial would not benefit a robber, murderer, or rapist, but this fact does not excuse mob violence, and any

Court in the land would be quick to reverse a conviction of a penal offense on this character of a hearing. Should not our Courts be equally as careful in protecting the fundamental right to liberty and upholding the simplest requirements of Justice when the offense charged is such that the trial Judge necessarily is personally interested and more than ever likely to deal unjustly.

Chief Justice Taft's language in the very recent case of *Craig v. Hecht*, 260 U. S. 714, is illuminating. He says:

> "The Federal statute concerning contempts, as construed by this Court in prior cases, vests in the trial judge the jurisdiction to decide whether a publication is obstructive or defamatory only. The delicacy there is in the judge deciding whether an attack on his own official action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication are manifest. But the law gives the person convicted of contempt in such case the right to have the whole questions on *facts and law* reviewed by three judges of the Circuit Court of Appeals, who have had no part in the proceedings, and if not successful in that Court to apply to this Court for an opportunity for a similar review here."

How then can the appellate Court or the Supreme Court review both questions of law and questions of fact, when no lawful procedure is followed, the evidence is suppressed by the trial Court, the defendant's mouth closed, and his answer stricken from the record?

There is no better argument directed against the record in this cause than to quote the language of a great and good lawyer to whom it was submitted, and who wrote:

> "The pretense of following the formalities of the law had the manner of insincerity, and it would seem that the part of frankness and candor wou'd have put in operation the Lettre de Cachet by which men were consigned to the Bastile when the subject could not reason why."

To make a pretense of following the forms of the law, but denying the substance of all rights, is more oppressive and unjust than not to pretend to follow them at all. Injustice always masquerades in the habiliments of Justice as a lie ever clothes itself in a half truth.

Petitioner's conviction is upheld by the Circuit Court of Appeals solely upon his admission of having written the letter in his attempted motion for time to employ counsel and prepare his answer, although he was never allowed even to complete this statement and show his good faith in writing the letter. However, such statement as he was permitted to make, taken in connection with the plain and obvious meaning of the letter, relieved of the individual "views" of the trial Judge, completely exonerates him of any wilful contempt. Let us in fairness examine the facts under which this conviction was obtained.

Petitioner is representing a client against whom the trial Judge harbored great personal prejudice and bias, if not actual malice (R. p. 16), which needs no better proof than his sentence of the client in this case. That such prejudice and bias exists is not even denied in the charge; it is tacitly admitted. Vast property rights are involved. In the trials already had the Judge openly and publicly admitted that it existed and that it was based "upon what he had heard" concerning the client. Counsel feeling that no free American citizen ought to be compelled to submit his property rights to a Judge, who admittedly was so biased and prejudiced from "what he had heard" concerning the client that he "questioned his own qualification" (using the Judge's own public language), and feeling that his own sworn duty to his client required him to take some steps to assure that fair and impartial trial to which every citizen is entitled, dictates with the friendliest intentions, a letter to the Judge, seeking an exchange of Judges in future cases, and giving as his reasons only those things which the Judge himself had publicly admitted to exist. In this he expressly reserves to the Judge the right freely to pass upon any unfinished matters, the disposition of which had been entered upon. Ten days later about 10 A. M. a U. S. Marshal walks into his office and places him under arrest without any notice of the charge against him. On the way to the Court he meets his law partner returning who informs him that the charge is the writing of such

a letter. He is presented instanter before the Judge, who has consumed eleven days preparing for the prosecution and arranging for a special prosecutor, designated by the Judge as a friend of the Court (R. p. 9), where he merely asks a reasonable time, even one day, to investigate the charge, consult counsel and plead thereto, all of which fair and reasonable requests are denied and he is immediately incarcerated where he is held incommunicado and not permitted to consult with counsel to perfect his appeal. As a good, loyal citizen he is expected to serve thirty days and come out of jail with feelings of high respect for the tribunal that sent him there. This character of procedure will not accomplish the purpose for which all punishments are designed. We can see also that such practice is not calculated to invite or obtain for Courts that public respect which they ought to have, and without which they cannot function properly.

Petitioner's sworn duty was to see that his client had a fair and impartial trial. In view of the many proceedings pending it was manifestly impossible at any stated period to disqualify the Judge in undisposed of cases, except at a time when some unfinished matter in another case might be pending before him. However, as to these unfinished matters the Judge's right to proceed therewith to completion was expressly acknowledged in the letter, and nothing therein contained could influence any man of ordinary firmness of character, and it is not possible to fairly say that the writer had any

such intention; at least no such intention is conclusively shown by the letter itself, even if it could be found to be correctly set forth in the charge. We believe that we can safely assert that counsel would not have been in contempt had he asked the Judge to voluntarily disqualify in these undisposed of motions, or permit same to be passed upon by some other Judge. The letter discloses, however, that the writer intended to assure the Judge that his full right to pass upon these undisposed of motions would not be questioned by affidavit or otherwise.

The only objection to the letter apparently urged in the purported charge is the statement of the defendant's former opinion that the Judge was big enough and broad enough to overcome the bias and prejudice admittedly existing, and the conclusion that he was mistaken therein. This is not a contempt. It is merely the statement of a truth, which this record clearly discloses. It is an unfortunate situation that a lawyer may, with flattery and praise, seek to and actually influence judicial action, but he cannot speak the truth with candor without being sent to jail. This is not as it should be. As has been said by a great Judge:

> "An independent and unterrified bar is the best assurance of an uncorrupt and incorruptible judiciary."

Exparte Robinson, 86 U. S. 205.
Hovey v. Elliott, 167 U. S. 409.

McVeigh v. U. S., 78 U. S. 80.
Windsor v. McVeigh, 93 U. S. 277.
Galpin v. Page, 85 U. S. 959.
In re *Pittman*, 1 Curt. (U. S.) 186.

(f) Petitioner was convicted without being confronted by any witnesses or evidence against him, and there is no evidence of guilt in the record to sustain the conviction.

Our Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

This is a criminal prosecution resulting in deprivation of liberty. That much must be conceded. Each and all of the protective provisions of the Constitution were violated in the procedure. Petitioner was not confronted with any witnesses against him, he was not allowed process for obtaining witnesses in his favor, he was denied the assistance of counsel for his defense, he was deprived of his liberty without any process worthy of the definition of "due process of law," as given by Mr. Webster in the Dartmouth College case (4 Wheat. 518):

> "A law which hears before it condemns, which proceeds upon inquiry and renders judg-

ment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

(g) The record on appeal was wrongfully altered after the appeal was perfected by arbitrarily striking out defendant's answer and motion in arrest of judgment, and for a new trial, and the Court's refusal to act on same was a refusal to perfrom the duties required of him by law, and his striking said papers from the record on appeal after appeal was perfected was an invasion of the province and jurisdiction of Appellate Courts, and deprived petitioner of substantial legal rights.

At the time of the pretended hearing, which in truth and in fact was no hearing at all, and when petitioner was prohibited by the Court from showing his good faith and absence of any intention to commit an offense, he specifically asked leave of the Court to later put in the record his defenses in full. The bill of exception shows:

"Mr. Clay Cooke: I am now stating my good faith.

Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record" * * * (p. 12).

"Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

Judge Wilson: You may." * * *

> "Mr. Clay Cooke: We will ask permission to add this to the bill, what we want to state and what we are not allowed to state here, we can add our defenses in full." (p. 13.)

It will be noted that immediately after this permission was given, petitioner was hustled off to jail without counsel, and held until friends perfected a writ of error (p. 18). Immediately upon his release from jail he prepared his answer in full in accordance with this leave granted in open court, in the nature of a motion in arrest of judgment and for a new trial supported by affidavits. This was duly filed and presented to the District Judge for action prior to the filing of the real authorized petition for writ of error, hereinafter mentioned. The Court refused to act on said motion, the record showing:

> "Defendants thereafter on the 9th day of March, 1923, presented to the Court their answer and motion in arrest of judgment and for a new trial and to reform the findings of fact, *filed in said cause under leave of the Court*, and same was, on to-wit, the 9th day of March, 1923, presented in open Court to the Honorable James C. Wilson, Judge of said Court, for his action thereon. The Court having received and examined said answer and motion, declined to grant same or to make any order thereon, to which action of the Court the defendants duly excepted." (p. 17.)

Thereafter petitioner filed his petition and assignments on writ of error, which were ordered sub-

stituted for the unauthorized appeal papers filed during petitioner's incarceration (p. 18). Petitioner thereupon procured a stipulation signed by his counsel and the United States District Attorney, and J. M. McCormick, Esq., special prosecutor, stipulating that this answer and motion in arrest of judgment and for a new trial should constitute a part of the record on appeal (pp. 49-50), this instrument being item "e" of said stipulation and was included as item "e" in petitioner's praecipe. The United States District Judge, according to the statement of the Clerk, struck this item "e" out of said praecipe and stipulation and directed the Clerk to omit same from the record on appeal (pp. 44-47). Petitioner filed a motion in the Honorable Circuit Court of Appeals for the Fifth Circuit, asking a writ of certiorari, to perfect the record by including this document (p. 50), which was overruled. While granting of a motion for a new trial is discretionary, as a rule, in the Federal Court, the Court has no right to refuse to exercise such discretion and to refuse to make any order whatever upon such motion.

Mattox v. U. S., 146 U. S. 140.
Pugh v. Bluff City Excursion Co., 177 Fed. 399, 101 C. C. A. 403.

The Court could not lawfully, while holding petitioner in jail, impell him into the upper Court by an unauthorized writ of error without even the privilege of filing his defense later as granted by

the Court in open Court. His refusal to act upon such motion filed in strict accordance with leave granted in open Court, was not only an abuse of discretion but was an arbitrary refusal to perform a positive duty imposed by law.

(h) A Sentence imposed for an offense not charged is void. 16 C. J. 1303.

The Court would receive no answer and would permit no evidence to be offered as to the alleged offense charged, pretending to find defendant's guilt from his own intuitive knowledge. It will be observed that after the Court had refused defendant the right to employ counsel, or the right to purge himself of said offense, he thereupon proceeded immediately to sentence petitioner in the following language:

> "And I have some more things I should like to remind you gentlemen of, your conduct and course as litigant and as attorney of this Court, in many respects, has been reprehensible. You have filled your pleadings with scandalous charges against trusted officials of this Court. You have charged that the Referee in Bankruptcy, the attorneys for the petitioning creditors and the Trustee in Bankruptcy entered into a corrupt conspiracy to do many unlawful things all to deprive you, J. L. Walker, of your rights, in this Court. And not only that, but while the jury were deliberating in cause No. 984, and though in charge of the Marshal of this Court, you, both of you being a party to it, employed a private detective to follow and shadow them with a view of report-

ing to you any corrupt conduct on their part; and you, J. L. Walker, after the jury had rendered its verdict of fifty-six thousand dollars against you, you employed this same detective, whose sworn statement I hold in my hand, to follow the foreman of the jury, Mr. E. G. Thomas, an honorable and respected citizen of Tarrant County, stating that you expected him to meet some one and be paid off, in other words, to receive bribe money for his verdict in the cause. And not only that, but you gave this same private detective to understand, that another one of the jurors, an honorable citizen of Parker County, had been improperly approached and influenced in this case. * * *

Mr. J. L. Walker: Your Honor, pardon me, but I would like to state there is nothing that J. L. Walker did but what he is in position to prove, and I have it in my pocket now—

Judge Wilson: Mr. Marshal, cause this man to desist.

Mr. J. L. Walker: I beg your pardon, I thought I had the right to speak now.

Judge Wilson: You haven't got a right. Your time to reply is passed. (Rec. pp. 15-16.)

In view of all this, it is not surprising that you men would deliver this letter to the Court with the utterly false statements in it that this Court had permitted himself to be improperly influenced and whispered to *and whispered to* by interested parties against a litigant in this Court. It is a simple and easy matter to analyze the character of any man who is expecting every other man to act dishonestly and corruptly.

Your whole course, as I say, has been contemptible, not only in this matter, and it is not surprising that you delivered this letter to the Court and is surprising that you did not state

more in the letter, and of course you are in contempt, if you are not, you have your remedy, and you, J. L. Walker, I sentence to the Tarrant County jail for thirty days and the payment of a five hundred dollar fine—

Mr. McCormick: I doubt whether Your Honor has the authority to assess both fine and imprisonment. The statute says you may punish by 'fine or imprisonment.' I believe I would suggest that you visit such fine as you see fit, or such imprisonment, but not both.

Judge Wilson: I assess a punishment of thirty days against each of these respondents." (R. p. 16.)

This statement of the trial Court shows that it was these other matters, his entire knowledge of which was gained by hearsay, that caused the whole proceeding and this is shown conclusively by the aforesaid motion in arrest of judgment and for a new trial, and the affidavits attached thereto, and gives some explanation of the action of the Court in not desiring this instrument to be before the Appellate tribunal. However, the record such as the trial Court graciously permits to be brought up, shows conclusively that it was for these other matters that the Court instituted the proceedings and prosecuted them, and that the letter itself is a mere pretense and was utilized because the Court desired to inflict punishment without permitting a public hearing or trial.

First, the letter was written eleven days before the contempt proceedings were instituted, but the

contempt proceedings were instituted immediately after the Court had procured affidavit of the private detective employed by petitioner to watch one member of the jury. Petitioner employed this detective to watch the juror on account of obvious misconduct by said juror, and that he was fully justified is shown by said motion. The statement that the jury was in charge of a Marshal is wholly untrue. The jury was not in charge of a Marshal, but for the entire ten days separated and went their respective ways was shown by the excluded answer. Second, it will be noticed that the Court directs that the pleadings of petitioner in which the Court says that the scandalous charges against the Referee and Trustee in Bankruptcy, and the attorney for the petitioning creditors is contained, shall be included in the record. The bill of exception shows:

> "The Court: The Court will have inserted in the record the pleadings of the defendant, J. L. Walker, in case No. 984 and also the charge of the Court in that case, and will also insert the pleadings of the respondent, J. L. Walker, prepared by the respondent, Clay Cooke, in cause in Equity No. 266, W. W. Wilkinson, Trustee, v. J. L. Walker.
>
> Mr. Clay Cooke: I would like also to insert in the record the evidence in the case of W. W. Wilkinson, Trustee, v. J. L. Walker, No. 984, at Law, the Q. and A. report of the testimony in that case.
>
> The Court: That will be excluded." (R. p. 15.)

The record shows that the sentence was pronounced because petitioner objected by pleadings to certain alleged illegal methods of administering the bankrupt act in said Court. Why cannot such methods when questioned stand the light of publicity or a public trial? It is apparent from the foregoing statements from the record that the writing of said letter is not what the Court had in mind in bringing the charge, else why did he not bring it when the letter was written?

It is manifest that it was these other matters for which he brought the charge, else why did he bring it as soon as he got knowledge by hearsay of the other matters? Else, why is his entire sentence taken up in a scandalous and untruthful denunciation of petitioner, while the Marshal holds the petitioner's mouth closed?

The motion in arrest of judgment and for a new trial show conclusively why the Court made these allegations in his sentence and shows that they were utterly unfounded in truth and in fact. Hence this answer, motion in arrest of judgment and for a new trial, must needs be excluded from the record on appeal lest this Honorable Court, as said by his Honor, Chief Justice Taft, should review both law and facts and see plainly the real purpose and animus directing this proceeding against petitioner.

There is no single principle so well settled in criminal jurisprudence, or which appeals more

strongly to the innate sense of justice in every man, than the principle that the accused is entitled to know definitely the charge against him, and is to be tried and sentenced on no other. The entire proceedings lead to the inevitable conclusion that the Court desired to punish defendants for shadowing Thomas, and from questioning the operations of the Trustee and Referee in Bankruptcy, and at the same time prevent any record being made which this Court could review.

He received the letter ten days before he moved to punish the alleged "obstruction of justice," but he moved immediately after he got the detective's affidavit.

DISCUSSION OF AUTHORITIES

How poorly does the record in this case comport with the principles laid down by a contemporary Court of the same judicial system, in *Phillips S. & T. Co. v. Amalgamated Assn.*, 208 Fed. 335, wherein the proper procedure is outlined in the following language:

> "The power to punish for contempt is to be used sparingly and with great caution and deliberation. The purpose in invoking the exercise of such power is the enforcement of the law and lawful orders and the punishment of acts of disobedience. A Court thus called upon to enforce the law may itself keep well within its limits.
>
> "It is not a party to the proceeding. In punishing for contempt the judge acts imper-

> sonally, and has no interest or concern other than the law should be obeyed and enforced. *To justify punishment, whether of a remedial or punitive character, the charge against the accused and the course of procedure must meet legal requirements, and the proof must conform to the settled rules of evidence.*"

If the learned judge just quoted is right, then the procedure in this case is wrong. In the case at bar the Judge made himself a party to the proceedings by engaging special counsel to represent the Court in the prosecution.

The Sixth Circuit Court of Appeals said in *Sona v. Aluminum Castings Co.*, 214 Fed. 936:

> "Respondents were unquestionably entitled to be informed of the charge made against them, and so clearly and definitely as not only to show prima facie a case against them, but that when arraigned they might know what answer to make, and to enable them to prepare their defense."

And this Honorable Court stated in *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt, the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

If these announced principles are correct, then the procedure herein is wrong.

This Court said in the *Gompers* case:

> "The complainants made each of the defendants a witness for the company, and, as such, each was required to testify against himself —a thing that most likely would not have been done or suffered by either party had they regarded this as a proceeding at law for criminal contempt, becaues the provision of the Constitution that 'No person shall be compelled in any criminal case to be a witness against himself,' is applicable not only to crimes, but also to quasi-criminal and penal proceedings."

If this Honorable Court was right in saying that in contempt proceedings Constitutional limitations are to be observed, then the procedure invoked herein to deprive petitioner of his liberty is unquestionably a violation of the Constitution.

If this proceeding is consonant with the dignity, decorum and orderly administration of justice in Federal Courts, then Constitutional guaranties are like a German Treaty, a mere scrap of paper, to be trampled upon by the Courts, its constituted guardians, whenever the wounded vanity or injured pride of the sitting Judge may dispose him to exercise harsh, arbitrary, and unbridled authority.

The evil of not requiring such proceeding to be conducted with decorum and in an orderly and judicial manner was never more apparent than in the instant case. There being no formal charge filed or presented against the defendants, the Court re-

fusing a formal trial, in remanding them to jail assails them upon matters entirely different from the writing of the letter, matters clearly not within the knowledge of the Court, nor committed in his presence, and upon which he heard no evidence whatever, and the harshness of the sentence is plainly based on these other considerations.

That the Constitutional right of trial by jury does not exist in contempts committed in the face of the Court, or contempts so near thereto as to obstruct the administration of justice, does not signify that the other protective provisions of the Constitution can all be ignored. The right of jury trial in such instances did not exist at common law, for the very simple reason that at common law, the right of the accused to purge himself of contempt by his oath was held inviolate, and the facts set forth in his oath were not allowed to be disputed, but were taken as true; therefore, at common law no issue of fact could ever arise in a contempt case. But this very reasoning impels the conclusion that the other guaranties of the Constitution do apply to such criminal prosecutions. To deny the right of trial by jury because at common law the defendant's answer could not be controverted and no issue of fact be raised thereon, and then deny the defendant the right to answer is to stultify both the common law and sound reason and violate the Constitution.

It is not liberty to say that a King cannot imprison without trial, and then say a Judge can. To

the man in jail it is a distinction without a difference.

This Court in the case of *Ex Parte Robinson*, 86 U. S. 205; 22 L. Ed. 505, granted a writ of mandamus to the Judge of the District Court for the Western District of Arkansas, requiring him to restore the petitioner's name to the roll of attorneys. His name was stricken from the roll by the judge for an alleged contempt committed in open Court. He had been cited by the Judge by rule to show cause why he should not be punished for contempt in connection with an alleged evasion of process of the grand jury by a witness. He appeared in Court in response to the rule, whereupon the Court informed him that his answer to the rule must be in writing; he stated that the rule did not so state, and thereupon it was ordered by the Court amended to require him to answer in writing and under oath, whereupon petitioner answered: "I shall answer nothing," which the Judge asserted was in an angry defiant, and disrespectful manner and tone, and that he regarded "the words and the tone, and the manner in which they were uttered as grossly and intentionally disrespectful, and as an expression of an intention to disobey and treat with contempt an order of the Court, and believing that the petitioner intended to intimidate him in the discharge of his duty, he felt it due to himself and his office to inflict summary and severe punishment upon the petitioner."

Mr. Justice Field in speaking for the Court said:

> "Before a judgment disbarring an attorney is entered, he should have notice of the grounds of complaint against him, and ample opportunity of explanation and defense. This is a rule of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. And such has been the general, if not uniform practice of the Courts of this country and of England. There may be cases, undoubtedly, of such gross and outrageous conduct in open Court on the part of an attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

Is a man's liberty of less value in the eyes of the Court than real or personal property, or the right to an office? If even in the case of gross and outrageous conduct in open court, he "should be heard" before he is condemned to lose an office, what can be said in defense of summary deprivation of liberty of person without any, much less "ample" opportunity of explanation and defense? This Court has well said "this is a rule of natural justice," just as it later said that "such judgment is not entitled to respect in any other tribunal." (93 U. S. 277.)

It cannot truthfully be said that the petitioner was afforded even a reasonable opportunity to be heard. He was arrested on an instanter writ of attachment, without notice of any charge against him, taken by the Marshal before the Court, where his efforts to gain a reasonable time to answer, the justice of which must be admitted by every fair minded man, and which was even consented to by the Government's counsel, was denied by the Court. Of what avail is summons or notice if the party is denied the benefit of notice? As said by Mr. Justice Field: "A denial to the party of the benefit of the notice is to deny that he is entitled to notice at all and the sham and deceptive proceeding had better be omitted altogether."

In the case of *Hovey v. Elliot*, 167 U. S. 409, this Court, speaking through Mr. Justice White, with respect to the power of the Courts of the District of Columbia to punish for contempt, says:

> "In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the Courts of the District of Columbia, notwithstanding the statute are vested with those general powers to punish for contempt which have been usually exercised by Courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a Court, possessing plenary power to punish for contempt unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to

answer or strike his answer from the files, suppress the testimony in his favor and condemn him without consideration thereof and without a hearing on the theory that he has been guilty of a contempt of Court. The mere statement of this proposition it would seem, in reason and conscience, to render imperative a negative answer.

"The fundamental conception of a Court of justice is condemnation only after hearing. To say that Courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever is, in the very nature of things, to convert the Court exercising such authority, into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

The following language of Mr. Justice Swayne in *McVeigh v. U. S.*, 78 U. S. 80, though spoken with reference to the deprivation of property rights, is equally, if not more applicable to the deprivation of personal liberty, because the intent to throw every protection around the liberty of the citizen is far more evident in the Constitution than the intent to protect mere property rights. He says:

"The order in effect denied the respondent a hearing. It is alleged that he was in position of an alien enemy and could have no locus standi in that forum. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and our civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first prin-

ciples of the social compact and of the right administration of justice."

And Mr. Justice Field in *Windsor v. McVeigh*, 93 U. S. 277, referring to the above language, says:

"The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a Court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights is admitted. Until notice is given the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of the notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, 'Appear and you shall be heard,' and when he had appeared saying, 'Your appearance shall not be recognized and you shall not be heard!' It is difficult to speak of a

> decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

This noble language of Mr. Justice Field condemns the procedure in the instant case so completely that it seems to have been written for this case; and with reference to the above quoted language Mr. Justice White said in *Hovey v. Elliott*, supra:

> "This language but expresses the most elementary conception of the judicial function."

In *Galpin v. Page*, 85 U. S. 959, this Court said:

> "It is a rule as old as the law, and never more to be respected than now, that no one is to be personally bound until he has had his day in Court, by which is meant that he has been duly cited to appear, and has been afforded opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

In re *Holt*, 55 N. J. L. 384, the defendant was charged with a contempt consisting of a libelous publication against the Court, and an attachment was issued without affidavit or proof, the Court simply acting on its own motion, and thereupon the defendant was taken into custody and gave bail and thereupon moved to set aside the attachment as illegal and unproved, which the Court refused,

and proceeded without further proof to adjudge the defendant to pay a fine of $1,000 and costs, and be imprisoned until the payment thereof, and this being appealed,

Beasley, C. J., said:

> "The members of the Court were the accusers, witnesses and judges; they took no testimony but convicted the defendant from their own intuitive knowledge. It is not necessary to say that such a course had not, in any respect whatever, the least semblance of a proceeding in a court of law."

And in re *Pittman*, 1 Curt. (U. S.) 186, after speaking of the criminal nature of the process in contempt of court, Curtis, J., said:

> "The character of the proceeding should not be lost sight of, and especially it should not be so varied as to deprive the party proceeded against of any substantial right. Now one of the most important privileges accorded by law to one proceeded against for contempt *is the right to purge hmiself*, if he can, by his own oath. So rigid is the common law as to this that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact by any other evidence."

The due administration of justice calls for the exercise of justice on the part of the Courts, and their dignity and public respect for their judgments demand that they proceed, especially where they are personally interested, with decorum, assuring the defendant every time honored right to present

whatever he or his counsel deem necessary or expedient in defense or mitigation of the offense charged. The harsh, arbitrary, and unseemly manner in which the Judge below proceeded in his endeavors to vindicate his own injured pride, denying the defendants all those rights which fair minded men would at once accord them, no matter how guilty, is far more detrimental and injurious to public respect for the Courts than any private letter counsel might write to a Judge in the heat of anger or feeling of outraged justice.

A Court cannot expect public respect for its decrees and judgments when it renders them in a manner that does violence to those fundamental principles of justice which are deeply imbedded in the Anglo-Saxon nature.

The Court would not permit counsel to explain even orally the circumstances under which the letter was written, and it is not even proven that the letter is correctly copied in the charge. Counsel did state that he dictated the letter with the friendly intention of relieving the Judge of embarrassment in the trial of the cases. It starts out with the assertion that it is written "as a friend to the Judge of the Court" (p. 3), and when counsel attempted to show that his intentions were friendly the Judge said, "it makes no difference how friendly" (R. p. 12). This is a cruel sentence which had better been left unsaid.

Lord Bacon has well said:

> "Those friends are weak and worthless that will not use the privilege of friendship in rebuking and admonishing their friends with freedom and confidence, as well of their errors as of their danger."

If this method of procedure is permitted, then there are no restrictions whatever on Federal Judges in the matter of punishment for contempt. The individual's liberty is as precarious as it was before Magna Charta was conceived.

The Appellate Courts have always exercised the right to review in contempt cases. Therefore, if this right to review is to be intelligently exercised by the higher Courts, there must be a trial conducted in accordance with the usual and customary methods and some record made, which an upper Court may review. To strike out of the record after the case has been concluded defendant's sworn answer, to refuse to hear evidence, to alter the record after appeal taken is not only to infringe defendant's rights but infringes the jurisdiction of the Court of Review.

Sec. 725 R. S. above cited states that "Contempts committed in the presence of the Court, or so near thereto as to obstruct the administration of justice, may be punished in conformity to the usages at law and in equity now prevailing." Congress recognizes that there are particular usages at law and in equity then prevailing with respect to the punish-

ment of such contempts. If the Judge could punish at his will Congress would not have mentioned the usages and customs whereby such causes are tried and punishment inflicted. It has never been held that the Court could summarily commit to prison, without charge or affidavit being filed, notice to the accused, an opportunity to purge himself by answer, and the introduction of evidence showing guilt.

The record conclusively shows that no fair opportunity was given the defendants to answer the charge; they were not allowed to plead, or consult counsel, although the Court had prepared for ten days for such prosecution, and employed a special prosecutor from Dallas; had set the stage as it were, and then sends out his Marshal, hales the defendants before him in custody without service of any notice of the charge upon them, and when they attempt to make even a verbal motion for time to plead are repeatedly interrupted and refused hearing, as witness the following:

> "Mr. Cooke: I am now stating my good faith.
>
> Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that is proper you may state it in your bill of exceptions in concluding the record." (R. p. 12.)

Then without permitting him to state his good faith he was hustled off to jail and held incommuncado, not permitted to telephone or consult

counsel, and when after release he files such sworn statement it is summarily stricken from the record.

> "Mr. Cooke:
>
> "That affiant had heretofore been on friendly relations with the said Judge James C. Wilson —Judge Wilson. That is a matter that is wholly immaterial here, it don't make any difference how friendly
>
> "Mr. Cooke:
>
> "I am stating my good faith in writing the letter. And affiant believed in writing said letter he would relieve the said Judge of embarrassment of filing the necessary statutory affidavits of disqualification, and if said letter—" (R. p. 12.)

Here affiant was intending to state, as he did later in his formal answer and motion in arrest of judgment, that if said letter contained any language to which the Judge did or could take any exception to it was due to the fact that affiant dictated same hurriedly and depended on his law partner, Mr. Dedmon, to read same after it was transcribed, and Mr. Dedmon being suddenly called to Austin, while affiant was absent laid the letter back on affiant's desk wihout reading it, and on Saturday morning just before nine o'clock affiant having an engagement in the District Court of Tarrant County, hurriedly sealed the letter, marked it personal, and handed it to Mr. Walker to deliver, affiant going immediately to the County Court House. (It must be noted that up to that time the defendant had not even seen said letter or the charge brought. It was

later read by the District Attorney), but here he was again interrupted:

"Mr. Cooke:
"I am going to state why I did not proceed—
"Judge Wilson:
"That does not constitute any defense to this contempt charge.
"Mr. Cooke:
"May I put in about writing the letter? May I put that in later?
"Judge Wilson:
"You may." (R. p. 12.)

After the incarceration incommunicado of the defendants they were not permitted to put it in later.

They filed their answer in full in connection with motion in arrest of judgment immediately after their release from custody; they also filed a stipulation of counsel that it might be included in the record before this Court. The only object of getting permission to file it later was that upon review this Honorable Court might be advised of the facts. After the appeal was perfected Judge Wilson scratched out of the stipulation of counsel (item (e) Record, p. 89) this answer and motion in arrest of judgment, and directed the clerk to omit it from the transcript to be filed in this Honorable Court.

We believe that a court attempting to try defendants against whom the Judge harbored such ill will as is exhibited in this proceeding is error in itself.

So far we have discussed the manner, form, and process by which the defendants were convicted

and sentenced. This we confidently assert was not that "due process of law" as understood under the Magna Charta, the Common Law, or our own Constitution. The sentence is a mere arbitrary edict without semblance of process of law.

The Offense Charged Does Not Constitute a Contempt

We desire, however, to consider whether the offense presumably charged constitutes a contempt of court at all under the restrictions placed by Congress on the power of Federal Courts.

Sec. 725, cited supra, provides:

> "The said Courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. Provided that such power to punish contempts shall not be construed to extend to any cases, except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice."

A commitment for contempt is void for excess of power, the punishment being imposed for supposed perjury alone without reference to any circumstances or condition giving to it an obstructive effect. *Ex Parte Hudgins*, 249 U. S. 378.

The Circuit Court of Appeals for the Fifth Circuit in its opinion herein filed says:

> "While the statute provides a method for disqualifying a judge there could be no impropriety in addressing a judge in a proper way, to secure his voluntary retirement. The propriety of the letter depends upon the language used by the writer in addressing the judge. Language, appropriate in an affidavit of disqualification, might not be used with propriety in a private letter addressed to the Judge."

Is it possible that citizens are to be incarcerated in jail for thirty days upon a mere question of propriety of certain conduct? The wisest judge once said, "If thy brother offend, rebuke him." The Circuit Judge says now: "If thy brother on the bench offend, say nothing to him, lest it be considered an impropriety and you go to jail, but you may safely publish the facts to the world." Good men and honest may be as far apart as the poles on a question of propriety, but crime is based primarily upon criminal intent coupled with a criminal act.

The Honorable Circuit Court of Appeals further defines the offense, as relied upon by the Government as follows:

> "The part relied upon by plaintiff as constituting the contempt is the statement that prior to the trial of the case of his client, Walker, the writer had believed Judge Wilson big enough and broad enough to overcome the personal prejudice against his client, which he knew to exist, but that the trial of that case had convinced him that he had been mistaken in entertaining that belief; that his client had desired but had not obtained the privilege of

stating his answer to the slanders that been filed in Court, and whispered in the ears of the Judge Wilson against him; that the writer's hopes in this respect had been rudely shattered, and his confidence in Judge Wilson destroyed, and he was for that reason voluntarily appealing to Judge Wilson to voluntarily disqualify himself in the other cases of his client." Rec. p. 172.)

The learned Circuit Judge then proceeds:

> "At the time of the delivery of the letter, it appears from the recital that Judge Wilson was still to be called upon to hear the motion for a new trial in the case which had just been tried, and also certain bankruptcy proceedings, all of which had proceeded too far for an exchange of judges. The natural tendency of the letter was to destroy the calm and dispassionate consideration by Judge Wilson of the pending matters, which it was his duty to give."

The best answer to this reasoning is the very forceful language of Mr. Justice Holmes in the *Toledo Newspaper Co. Case*, 247 U. S. 402:

> "But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty."

In that case because the publications were made to the public generally and were likely "to arouse distrust and dislike for the Court," and prevent obedience to its decrees if rendered, it was deemed

sufficient to justify an information and fine, though after a formal trial.

In this case the Circuit Court of Appeals says because, to avoid publicity, counsel's position was communicated personally and privately, even unknown to his client, it would prevent one supposed to have dignity, poise and power requisite for a high judicial office, from calmly considering matters which the letter itself asknowledged his full right to pass upon, with every assurance that no steps would be taken to disqualify him therein.

The purported letter itself does not charge the Judge with anything which would or could be considered as a threat or intimidation. The letter asserts that it is written by the lawyer "as a friend of the judge of the court." *It relates entirely to other cases not even set for trial and in which the Judge was subsequently disqualified by affidavit to try the same* in strict accordance with the statute. Therefore, as he can enter no future orders in any of the cases made the subject of the letter, and evidently was not expected to do so, the letter could not "obstruct the administration of justice" in any of said causes. The Judge seems to infer that the letter being delivered (as he claims) during a ten minutes recess in the trial of another case, involving other parties, not in anywise connected either with the letter or defendants, it tended to obstruct the administration of justice in that case, but it could

hardly be suggested that the letter would so far upset the Judge as to prevent him fairly continuing the trial of an entirely foreign case then pending. To even think so is to ascribe to him a lack of self-control wholly incompatible with the dignity of his position. It is apparent from the letter that counsel never expected the Judge himself to pass upon any of the cases made the subject of the letter. The Judge asserts that it is his view that the letter was intended to "destroy the very fairness and impartiality" of the Judge acting on certain motions for rehearing in other cases which were not the subject of the letter.

The letter was not written about these at all, but to save any doubt, the letter asserted that no question as to his right to pass on these other matters was raised—in other words, his absolute right to pass upon them was conceded, and the letter merely referred to them so as to make it clear that his right to pass on same would not be raised, but on the other cases he would be disqualified in the statutory method unless he voluntarily exchanged benches or disqualified himself. Is there anything in this that could have the effect of intimidating the Judge or obstructing the administration of justice? To hold so would be to hold the Judge to be of very weak character indeed. Certainly no intention to intimidate could be imputed to the writer. He did not expect a favorable decision in any matter, nor did he ask or seek such. He merely sought his voluntary

disqualification in future matters, conceding his full right to act upon any pending or unfinished matters. Certainly it is not right for the Judge to suppress the evidence tendered by defendant as to his intent and motives and then conclusively presume motives far from his mind. It would be just as logical and just as fair to assume that these contempt proceedings were instituted to intimidate the lawyer from performing his sworn duty to his client to disqualify the Judge in the statutory method, as to assume that the letter was intended to intimidate the Judge. Certainly, the contempt proceedings did not have the effect of intimidating the lawyer, as disqualifying affidavits were immediately filed in all of the cases mentioned in the letter as soon as he was released from custody and it does not appear wherein the letter intimidated the Judge, as he promptly overruled all motions for rehearing on the other matters pending.

In the case of the*United States v. Craig*, 279 Fed. 900, the defendant was committed for writing a letter in which numerous serious charges against the Judge were made reflecting upon the handling of a receivership proceeding then pending. A fair trial was had on information filed by the District Attorney, defendant was represented by counsel and testified in his own behalf, but was convicted by the trial court and committed with the proviso that he might purge himself by filing an unqualified retraction of the alleged false charges with the clerk.

A Judge of the Circuit Court of Appeals for the Second Circuit in exparte *Craig* 274 Fed. 185, released the defendant on writ of habeas corpus, stating in his opinion as follows:

> "It will be observed that the entire letter refers to the denial of the application to appoint a co-receiver. The purport of the letter, taken as a whole, is a criticism of the District Judge who denied the application * * * * *In determining whether the language used was or was not a contempt regard must be had not merely to the very words used but to the surrounding circumstances in connection with which they were used.* In constructive contempt, such as is charged here, where the language used is not per se libelous, or is fully capable of innocent meaning, the intention of the offending party is a factor and may control. So where the publication complained of can have no tendency to prejudice the case, the publisher may not be found guilty of contempt. To vindicate the dignity of the court in compelling respect and obedience a judge may best demonstrate his title to respect by keeping within the confines of judicial obligation and not reaching out beyond his powers to visit punishment upon another official who acts within the limit of what he conceives to be his duty and who attempts whether inadvisably or not, to secure some means of keeping his employer advised by right of access rather than favor of access to papers and information concerning the railroad properties. There is no divinity about the office or duties of a judge that makes him free from criticism. The statute required a misbehavior which causes an obstruction of the administration of justice. It is well settled that

not exist in the same mind at the same time, because they are utterly antagonistic mental qualities. Therefore, since the fact of such bias and prejudice and that it was based upon hearsay is not denied, his sitting in the case was in itself more of an obstruction to justice than any protest thereof could in any wise be. Therefore, the only effect of the leter, the only purpose of the letter was to procure the due and proper administration of justice in behalf of the defendant and to preclude and prevent the personal bias and prejudices of the Judge so developed over a long period of years and admitted by him to exist from intervening itself between the property rights of the defendant and the eternal principles of justice. It cannot be without proof presumed conclusively that the letter was written for the purpose of obstructing the administration of justice, nor can it be conclusively presumed that it did obstruct it. However uncomplimentary of the personality of the Judge it may be, it was not libelous per se nor did it pertain to any matter so far as disqualification of the Judge was concerned then pending or which the defendant ever proposed would be pending before the District Judge.

We submit that (1) No offense is charged against petitioner; (2) No offense is proven against him; (3) No trial has been had; (4) No legal sentence pronounced.

Petitioner is deprived of his liberties without due process of law; fundamental safeguards denied him, and even the right of review emasculated.

WHEREFORE, petitioner respectfully prays that justice may be done; that said decree and sentence of said District Court of the United States sentencing petitioner to thirty days in jail for contempt of Court, and the judgment and opinion of the Honorable Circuit Court of Appeals for the Fifth Circuit affirming same be set aside and reversed, and that judgment be here rendered that said proceeding against petitioner be dismissed or remanded for further proceedings according to the usages and principles of law.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA
v.
CLAY COOKE, PETITIONER
No. 311

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The petitioner, Clay Cooke, is an attorney of the State of Texas, whose client, one J. L. Walker, was a litigant in several matters pending at the time herein mentioned in the District Court of the United States for the Northern District of Texas, before the Honorable James C. Wilson, a judge of that court. Certain of these matters had proceeded to judgment, in which motions for new trials were pending, and the others had not yet come on for hearing. Of the matters heard, the trial of one, referred to in the record as No. 984, had been completed by verdict of the jury on February 15, 1923, at 5.30 p. m. At 11.15 a. m. of the succeeding day, February 16, 1923, while a case

ARGUMENT

Petitioner was guilty of contempt

Section 725, R. S., provides as to the power of the Federal courts in connection with the offense of contempt of court, that:

> The said Courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases, except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.

This Act is not the source, of course, of the power of the Federal courts to punish contempts. It but restricts their inherent power. Under it they can only punish as contempt " the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice."

Was petitioner's act in writing and delivering this letter " misbehavior " and, if so, was that misbehavior in the " presence of the Court "?

Answering the second part of this question first, we say that unquestionably under the authority of *In re Savin, Petitioner,* 131 U. S. 267, the delivery of this letter to Judge Wilson in his chambers during a brief recess in a trial then going on was an act done " in the presence of the court " within the meaning of Section 725. The Court of Appeals so

held (R. 54 and 55) and we observe that petitioner does not in his brief contend that what was done was not done " in the presence of the court."

Was petitioner's act " misbehavior? " We answer, it was clearly. " Misbehavior " is defined as " improper, rude, or uncivil behavior; ill conduct; misconduct." (Webster's New International Dictionary.) The word is here used in this ordinary sense. Such " misbehavior," committed in the presence of the court, was always punishable as contempt.

To say to the court in writing, as the petitioner here did, that in a case just ended and in which a motion for a new trial was pending, he had proved himself not big enough and not broad enough to restrain his bias and prejudice against a litigant, that in his conduct of the trial he had manifested such prejudice and bias, and that he was possessed of this prejudice and bias against the litigant because he had permitted slanders to be whispered in his ears, to say to the court that the petitioner's hopes that the court would conduct himself as a judge should had been shattered by the judge's conduct and not only shattered but rudely shattered, to say all of these things, and in substance they were all said in the petitioner's letter, was patently to offer insult to the court and to openly impeach his honor both as judge and man. It was " misbehavior " within any possible meaning of that word.

Being committed in " the presence of the court," it was punishable contempt.

Certainly it is no defense to say that there were parts of the letter that were not improper, or that much of it might lawfully have been incorporated in an affidavit to disqualify the judge in cases not yet tried. All that may freely be conceded. There remains the offending language which had no reference to the cases yet for trial but referred solely to the case still pending on motion for new trial.

If that language had been spoken orally in the face of any court while in session in the discharge of public duty and bearing upon a matter still pending, it would have brought swift, summary, and just punishment. Should the case stand otherwise because the insult was not spoken but handed to the judge in writing and not as he sat upon the bench but when he had stepped down during a moment's intermission? Very clearly, we believe, these questions must be answered in the negative.

Petitioner was accorded a fair hearing

Says petitioner in his brief, even if the delivery of this letter was contempt of court and as such deserving punishment, my conviction was obtained without due process of law and that in eight particulars. These are discussed in the brief of the petitioner on pages 20 to 45, inclusive. Briefly, we notice each.

Particular (a), page 20 of the brief, is that the writ of attachment was not supported by "oath or affirmation" and hence violated Article IV of the Amendments to the Constitution which provides: "The right of the people to be secure in their persons * * * against unreasonable seizure shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, etc." To this particular we answer: 1st, the word "warrant" as used in the Amendment has never been held to include an attachment to answer for contempt of court. Petitioner cites no case so construing it. 2nd, it has been repeatedly held that in case of a direct contempt, that is a contempt committed as this one was in the presence of the court, neither affidavit, notice, rule to show cause, or other process is a necessary prerequisite to the court's jurisdiction to punish the contempt. *In re Terry*, 128 U. S. 29, 307; 13 C. J. 63. 3rd, the petitioner waived any objection to the basis of the attachment by pleading orally and in writing to the charge upon the merits. 4th, this objection is contained in none of the assignments of error. (R. 21 et seq.)

In support of this particular petitioner cites *Phillips S. & T. Co.* v. *Amalgamated Ass'n.*, 208 Fed. 335, and *Sona* v. *Aluminum Castings Co.*, 214 Fed. 936, neither of which was a case of direct contempt committed in the presence of the court. Each was a contempt proceeding instituted by the injured party for failure to obey an injunction.

They are so clearly distinguishable as to constitute no support whatever for petitioner's contention.

Particular (b), page 21 of the brief, is that no offense is charged against the United States. Reference is made to the statute, R. S. 725, authorizing punishment as for contempt of "misbehaviors committed in the presence of the court or so near thereto as to obstruct the administration of justice." Petitioner says "the purported charge does not state by any *positive* averment that the writing of said letter obstructed the administration of justice." To this we answer: 1st; no formal charge whatever was necessary in case of a contempt committed in the presence of the court. (Authorities supra.) 2nd; the statute does not require that the "misbehavior," if committed in the presence of the court, must *also* be of such character as to "obstruct the administration of justice." That qualification is required only as to misbehavior not committed "in the presence of the court." 3rd; as to this particular also, if ever of any merit, it was waived by the petitioner's pleading to the charge and by its omission from the assignment of errors.

The cases cited in support of this particular are *Ex parte Hudgins*, 249 U. S. 378 and *Ex parte Craig*, 274 Fed. 177. They do not support the contention for which they are cited. On the contrary, in the *Hudgins case* it is expressly stated, 1 c. 383, that "*the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of*

accusation and methods of trial generally safeguarding the rights of the citizen." The *Hudgins* case does indeed assert that " an obstruction to the performance of judicial duty " is an essential element of contempt and " that the presence of that element must be clearly shown," but that it must be specifically charged it does not hold. Moreover, it was not a case where insulting language was offered to the court. What the court said must be construed in the light of the facts of the case. So construed, the language used does not mean that " misbehavior " in the form of insult to the presiding judge in the presence of the court is not contempt unless it necessarily also obstructs justice. The distinction is, however, not important here since, as the court below pointed out in its opinion, the necessary tendency of such contemptuous language as the petitioner here employed was to prevent a free and calm disposition of pending matters.

In connection with this thought it is as well here as elsewhere to refer to petitioner's intimation on pages 63, 64, and 65 of his brief that the language used in his letter would not have disturbed the judicial equilibrium of a judge " of ordinary firmness of character." " To hold " that what was said in the letter would obstruct the administration of justice " would be to hold the judge to be of very weak character indeed," so petitioner maintains. But it is sufficient to point out that a like argument would justify any conceivable indignity offered to

a court. It is scarcely a defense to insulting language to assert that the court should have been sufficiently superhuman as not to have felt its sting.

Ex parte Craig, the second of the cases cited in support of particular (b), was one of constructive contempt, if any, as distinguished from one of direct contempt, committed in the presence of the court. The importance of that distinction is pointed out. 274 Fed. 1. c. 185. The case is of little value here. It holds merely, what no one questions, that as to a contempt committed outside the presence of the court, it must be such as obstructs justice. That is the plain language of the statute. The case then holds that the language used was not calculated to produce that consequence.

In connection with the *Craig case* we call attention to this language of the court therein, l. c. 187. "*The misbehavior* (referring to what 'misbehavior' constitutes contempt) *must present an interruption which comes between the Court and the consideration of the subject-matter then under submission in some way as to distract the mind of the court and pervert the course of justice, or even to divide the attention of the court.*" The definition seems good. It does not help petitioner. It is difficult to imagine langauge more likely than that used in the letter in this case to distract the mind of the court in reference to the pending matter. And as to whether a matter is still pending the *Craig* case says, l. c. 187: "*A cause is pending when it is*

still open to modifications, appeal, or rehearing and until the final judgment is rendered."

Particular (c), page 22 of the brief, asserts that petitioner was not informed of the nature and cause of the accusation. Reference is made to Article IV of the Amendments to the Constitution, providing that " In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation." But this is one of those constitutional limitations which this court said in the *Hudgins* case, supra, did not apply to a contempt committed " in the presence of the court." Moreover, the record clearly shows that in truth and fact the petitioner was fully informed as to the charge against him before he undertook to state his defense. None of the six cases cited in support of this particular on page 24 of petitioner's brief either holds or even distantly suggests that in a case of direct contempt committed in the presence of the court a formal paper must be served upon the accused party setting out the nature of his offense before he can be punished for the contempt.

Article VI of the Amendments to the Constitution, relating to the right of counsel in all criminal prosecutions, is invoked as the basis for particular (d), page 24 of the brief, but the inapplicability of this Amendment, with its several guarantees, including that of trial by jury, to a proceeding for the summary punishment of contempt in the presence of the court is so well recognized that discus-

sion of it is idle. Petitioner has found or at least has cited no case to support his contention here.

Particular (e), page 28 of the brief, assumes without citing any supporting authority (the cases referred to on page 35 do not suggest such a principle) that one charged with a direct contempt committed in the presence of the court has the right to plead formally to the charge. Of course he has no such right. Here again the *Hudgins* case is in point and decisive. The petitioner was accorded every right to which in law and justice he was entitled. If he had orally spoken the insulting language in the presence and in the face of the court he would have been entitled to no hearing of any kind. Similarly he would have been entitled to none had he personally delivered the letter to the judge. Then all the facts would have been within the knowledge of the court and the law of contempt does not require the absurdity of a hearing to establish the existence of facts occuring in the court's presence. Must the judge be sworn to testify?

The most petitioner was entitled to was opportunity to deny authorship of the offending letter, since it was delivered by the hand of another although in his presence. But he admitted authorship. There was nothing that might have been proper subject matter of any further hearing. Such hearing as he was entitled to he had.

Particular (f), page 36 of the brief, again relies on the inapplicable Sixth Amendment to the Constitution.

Particular (g) is not directed at the hearing before the District Court but at an alleged alteration of the record after the appeal to the Circuit Court of Appeals. More specifically, the complaint is the failure of the District Court to send up a so-called answer which was not filed until after writ of error had been allowed. It was filed or offered for filing on March 9, 1923. (R. 17.) The writ of error was allowed on February 26, 1923. (R. 18.) Certainly the petitioner was deprived of no legal right by any failure to transmit to the Circuit Court of Appeals what purported to be an answer admittedly offered for filing after writ of error had been allowed.

As for particular (h), page 40 of the brief, to the effect that the punishment imposed was not for the letter but on another account, it is wholly unwarranted in view of the record and especially of the Court's formal statement of Facts and Judgment. (R. 5 to 8, inclusive.) Certainly this Court will not say, against the solemn record of the District Court as to the thing charged and found to be contempt, for which petitioner was sentenced, that in reality he was punished for some other offense. Certainly no such conclusion would be justified by the mere fact that the Court in sentencing petitioner criticised other conduct of petitioner and his client.

CONCLUSION

The letter written to Judge Wilson and handed to him under the circumstances shown by this record was a contempt committed in the presence of the court. If it was not, then, of course, the decision below should be reversed outright. In our view it was unquestionably contempt. As to the hearing, it should have been and was summary. Guilt was in effect admitted. In what way was petitioner injured by any omission in connection with the hearing? Even now, in his long brief, he suggests no defense, except that he might have shown his reputation as a lawyer and, as an extenuation, the carelessness with which the letter was prepared. But these are no defenses. There is no justification, therefore, we think, for a remanding of the case. The decision below was right. We respectfully submit it should be affirmed.

JAMES M. BECK,
Solicitor General.

MERRILL E. OTIS,
Special Assistant to the Attorney General.

MARCH, 1925.

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judge of the desire of his client to have another judge try four other cases yet to be heard, and of his own desire to avoid the necessity of filing in those cases an affidavit of bias under § 21, Judicial Code, by inducing the judge voluntarily to withdraw, but also evinced his heat over the judge's conduct in the case lately tried and characterized it in severe language personally derogatory to the judge. *Held* that in the latter aspects the letter was contemptuous. P. 532.

2. When a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. *Ex parte Terry*, 128 U. S. 289. P. 534.
3. But where the contempt was not in open court, though constituting "misbehavior in the presence of the court" within the meaning of Rev. Stats. § 725, due process of law requires charges and that the accused be advised of them and be given a reasonable opportunity to defend or explain, with the assistance of counsel, if requested, and the right to call witnesses in proof of exculpation or extenuation. P. 535.
4. Where the alleged contumacy was committed by sending a letter to the judge in chambers, and eleven days thereafter an order reciting the facts and adjudging contempt was entered and an attachment thereupon issued under which the accused was arrested forthwith and brought before the court and, upon admitting authorship of the letter, was pronounced guilty because of it and of extraneous facts referred to by the judge as in aggravation, and was forthwith punished, without being allowed to secure and consult counsel, prepare his defense and call witnesses, or to make a full personal explanation,—*Held* that the procedure was unfair and oppressive and not due process of law. P. 537.
5. Where conditions do not make it impracticable and the delay will not injure public or private rights, a judge, in a case of contempt consisting of a personal attack upon himself, may properly ask that the matter be heard by a fellow judge. P. 539.
6. In this case, *decided* that the judge who imposed the sentence reversed should invite the Senior Circuit Judge of the Circuit to assign another judge to sit in the second hearing. P. 539.

295 Fed. 292, reversed.

Clay Cooke and J. L. Walker were each sentenced for thirty days' imprisonment for contempt by the United

States District Court for the Northern District of Texas. The case was taken on error to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the sentence of Cooke and reversed that of Walker. By certiorari, Cooke's sentence was brought here.

Walker was defendant in a series of suits growing out of the bankruptcy of the Walker Grain Company. One of the cases, numbered 984, after a long jury trial resulted in a verdict against Walker of $56,000. The next day, while the court was open and engaged in the trial of another cause, and during a ten minutes' recess for rest and refreshments, Walker, by direction of Cooke, delivered to the District Judge in his chambers, adjoining the court room, and within a few feet of it, a letter marked "Personal", as follows:

"Fort Worth, Texas, February 15, 1923.

"Hon. James C. Wilson,
Judge U. S. District Court,
Fort Worth, Texas.

"Dear Sir:

"In re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.; in re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker, in re No. 1001, in Bankruptcy, Walker Grain Company.

"Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will consent to your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

"You having however proceeded to enter judgment in the petition for review of the action of the Referee on the summary orders against the Farmers' & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

"I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer, and an honest man is apparent.

"Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

"Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

"My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment Your Honor's pleasure with respect to the mat-

ters herein presented, so that further steps may be avoided.

"With very great respect, I beg to remain,

"Yours most truly,

CLAY COOKE."

Eleven days after this, on the 26th of February, the court directed an order to be entered with a recital of facts concluding as follows:

"Therefore, since the matters of fact set forth herein are within the personal knowledge of the judge of this Court, and since it is the view of this Court that said letter as a whole is an attack upon the honor and integrity of the Court, wherein it charges that the judge of this Court is not big enough and broad enough to truly pass upon matters pending therein, and wherein it charges in effect that the judge of this Court has allowed himself to be improperly approached and influenced and whispered to by interested parties against a litigant in the Court, and since it is the view of this Court that such an act by a litigant and his attorney constitutes misbehavior, and a contempt under the law and that the threats and impertinence and insult in said letter were deliberately and designedly offered with intent to intimidate and improperly influence the Court in matters then pending and soon to be passed upon, and to destroy the independence and impartiality of the Court in these very matters, it is ordered that an attachment immediately issue for the said J. L. Walker and Clay Cooke, and that the Marshal of this Court produce them instanter before this Court to show cause, if any they have, why they should not be punished for contempt."

The marshal arrested the defendants and brought them to court. The following statement shows in substance what then occurred:

"Judge Wilson: At this time I will call the contempt matter against Clay Cooke and J. L. Walker, attachment having been issued for these respondents.

"I have requested Judge J. M. McCormick, of Dallas, to be present and act as a friend of the Court in this proceeding, and have also requested the District Attorney, it being in its nature a criminal matter, to act."

Mr. Clay Cooke said that he had not known of the attachment until that morning, that he would like time to prepare for trial and get witnesses for their defense, that there might be extenuating circumstances which would appeal to the court's sense of fairness and justice in fixing whatever penalty might be imposed and that he had attempted to secure counsel but through illness or absence of those he sought he had failed up to that time.

Judge Wilson intimated that he would not postpone the matter, and said:

"There is just this question involved, and as stated by counsel representing the Court, these facts are within the personal knowledge of this Court. Did you deliver this letter to the Judge of this Court?

"Mr. Clay Cooke: Is your Honor asking me?

"Judge Wilson: I am stating the question—and does that under the law constitute contempt? If you have any defense, you have not suggested any. This Court would be glad to give you ample time to file any pleadings pertinent and secure any evidence that might support or tend to support it, but unless you desire now to state that you have some defense you care to file and present, and indicate what that defense is to this charge, then I shall direct that this proceeding go forward, and you are fully protected, since the higher Courts are open to you to correct any error, even to the Supreme Court, that the Judge of this Court might commit here. Now if you have any defense that is pertinent to this order, state what it is."

Mr. Cooke began to dictate a statement to be filed by him, to the effect that he and Walker believed that they had a good defense, and that the matters of fact stated

in the letter as to the bias and prejudice of the judge were true.

"The Court: That does not constitute any defense.

"Mr. Clay Cooke: I'll state then something otherwise—

"Judge Wilson: Repeating the insult does not constitute any defense.

"Mr. Clay Cooke: I am not trying to repeat the insult, if your Honor please . . . I am now stating my good faith.

"Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record.

"Mr. Clay Cooke: That affiant had heretofore been on friendly relations with said Judge James C. Wilson—

"Judge Wilson: That is a matter that is wholly immaterial here it don't make any difference how friendly.

"Mr. Clay Cooke: I am stating my good faith in writing the letter. And affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of finding the necessary statutory affidavits of disqualification, and if said letter—

"Judge Wilson: Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

"Mr. Clay Cooke: I am going to state why I did not proceed—

"Judge Wilson: That does not constitute any defense to this contempt charge.

"Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

"Judge Wilson: You may.

"Mr. Clay Cooke: That affiant wrote said letter without any intention on his part of incurring contempt proceedings and without any thought of contempt and believed that said letter would not be so construed. That affiant has the highest regard for this Court as a Judge; that affiant believed in good faith the Court had heard things concerning—"

Then Mr. McCormick, for the court, interposed an objection that there ought not to be an accentuation of the contempt in the letter by a repetition of innuendoes and reflections on the court or by including them in the record.

Mr. Clay Cooke said he had dictated and sent the letter after advising with reputable counsel who had read it and believed it proper. "The letter itself was not carefully read by myself."

"Judge Wilson: I would like to know who said reputable counsel are."

Mr. Clay Cooke said it was his partner, Mr. Dedmon. He said the letter was dictated and was not read by his client, J. L. Walker, that he had not made the contents public and intended it only for the judge's eye to relieve him from embarrassment, that the purpose was most friendly. After repeating a desire for counsel and the investigation as to the law of contempt in its application to this case, Mr. Cooke referred to the statement he had been attempting to dictate and asked that he might make it fuller because of certain interruptions and to put in anything relevant to his defense.

"You may add—I have not heard any defense suggested here yet, but you may add any, however, if you think of any later. Read the order, Mr. District Attorney."

The District Attorney then read the order for the arrest of the defendants set forth in the record in said cause, the defendants were directed to stand up and the court addressed them as follows:

"Judge Wilson: The findings of fact, all of which are within the personal knowledge of this Court, will be made in the order entered:

"Now, gentlemen, it is a matter almost of common knowledge that the Courts may be lawfully criticised the same as any other branch of the government, and that it is not unlawful or a contempt of the Court for any person, including newspapers, to pass criticisms upon the judiciary, including the Federal Courts and the judges regardless of their truth or falsity, when those criticisms are concerning past matters not at the time pending in the Courts. This law is based upon sound principle. Every branch of the Government needs constructive criticism; when it is such it is wholesome and helpful; no judge I think welcomes it more nor fears it less than the Judge of this Court. But it is altogether a different proposition and is unlawful and clearly constitutes a contempt of Court for any litigant or attorney to pass such in the presence of the Court, not in a respectful, but in a contemptuous and slanderous manner concerning matters then pending and later to be disposed of by the Court.

"It is obvious upon a reading of this letter that you deliberately designed to improperly influence the Court in these pending matters wherein no disqualification is suggested, and you were very careful to suggest that the Court was not disqualified in certain matters, and it is the view of the Court that it was your thought and aim to destroy the independence and the very impartiality of the Court as to those matters.

"And I have some more things I should like to remind you gentlemen of, your conduct and course as litigant and as an attorney of this Court, in many respects, has been reprehensible. You have filled your pleadings with scandalous charges against trusted officials of this Court. You have charged that the Referee in Bankruptcy, the attorneys for the petitioning creditors and the Trustee in Bankruptcy entered into a corrupt conspiracy to do

many unlawful things all to deprive you, J. L. Walker, of your rights, in this Court. And not only that, but while the jury were deliberating in cause No. 984, and though in charge of the marshal of this Court, you both of you being a party to it, employed a private detective to follow and shadow them with a view of reporting to you any corrupt conduct on their part; and you, J. L. Walker, after the jury had rendered its verdict of fifty-six thousand dollars against you, you employed this same detective, whose sworn statement I hold in my hand, to follow the foreman of the jury, Mr. E. G. Thomas, an honorable and respected citizen of Tarrant County, stating that you expected him to meet some one and be paid off, in other words, to receive bribe money for his verdict in said cause. And not only that, but you gave this same private detective to understand, that another one of the jurors, an honorable citizen of Parker County, had been improperly approached and influenced as a juror in this case—

"Mr. J. L. Walker: Your Honor, pardon me, but I would like to state that J. L. Walker did but what he is in position to prove, and I have it in my pocket—

"—Mr. Marshal, cause this man to desist.

"Mr. J. L. Walker: I beg your pardon I thought I had the right to speak now.

"Judge Wilson: No, you haven't got a right. Your time to reply is passed.

"In view of all this, it is not surprising that you men would deliver this letter to the Court with the utterly false statement in it that this Court had permitted himself to be improperly influenced and whispered to by interested parties against a litigant in this Court. It is a simple and easy matter to analyze the character of any man who is expecting every other man to act dishonestly and corruptly.

"Your whole course, as I say, has been contemptible, not only in this matter, and it is not surprising that you delivered this letter to the Court and is surprising that

you did not state more in the letter, and of course you are in contempt, if you are not, you have your remedy, and you, J. L. Walker, I sentence to the Tarrant County jail for thirty days and the payment of a five hundred dollar fine—

"Mr. McCormick: I doubt whether your Honor has the authority to assess both fine and imprisonment. The statute says you may punish by 'fine or imprisonment.' I believe I would suggest that you visit such fine as you see fit, or such imprisonment, but not both.

"Judge Wilson: I assess a punishment of thirty days against each of these respondents."

Mr. Cooke asked that a bond be fixed pending appeal.

"Mr. McCormick: An appeal does not lie in such a case. The evidence, gentlemen, if at all, must be reviewed by writ of error, if reviewed at all.

"Mr. Clay Cooke: The statement of the Court is he will consider a writ of error or appeal. In this case we will have sixty days—

"Judge Wilson: Take these respondents to jail, Mr. Marshal.

"Mr. McCormick: If they are going to take the full sixty days on the matter—

"Judge Wilson: No, there is not going to be any sixty days, the higher Court is going to pass upon this matter at once. . . .

"Mr. Dedmon: Did your Honor fix the amount of the bond?

"Judge Wilson: One thousand dollars. I am not allowing them bond, not releasing the defendants. It is a writ of error bond.

"Mr. Dedmon: You mean you are not going to let them appeal from the order adjudging them to spend thirty days in jail?

"Judge Wilson: If they perfect this appeal, I might release them from jail—show that they are going to appeal it and do it in a hurry."

COOKE *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 311. Argued March 20, 1925.—Decided April 13, 1925.

1. On the day following a trial in the District Court in which a verdict had been rendered against his client, in a case in which other necessary proceedings remained pending, and while the court was engaged in trying another case, but during a short recess, an attorney at law addressed a letter, marked "personal," to the District Judge and caused it to be delivered to him at his chambers next the court room, in which the writer not only advised the

Mr. Edwin C. Brandenburg, with whom *Messrs J. A. Templeton, G. A. Stultz, W. E. Spell,* and *E. Howard McCaleb* were on the brief, for petitioner.

Petitioner's conviction was obtained without due process of law.

He was sentenced without any affidavit or other authentic charge being brought against him, or any notice of the offense charged, *Phillips S. & T., Co.,* v. *Amalgamated Ass'n.,* 208 Fed. 335; *Sona* v. *Aluminum Castings Co.,* 214 Fed. 936.

Even the purported charge states no offense against the laws of the United States. If everything in the purported charge were admitted to be true, it would merely mean that the judge held certain private "views" as to certain private, confidential acts of the defendant, and these views might or might not be justified by the facts. *Ex parte Hudgins,* 249 U. S. 378; *Ex parte Craig,* 274 Fed. 185.

Petitioner was not informed of the nature and cause of the accusation. The statute was in no respect complied with. The petitioner was arrested on a warrant that neither charged an offense nor contained a certified copy of any charge, and was immediately committed to jail for 30 days. *Sona* v. *Aluminum Castings Co.,* supra; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Ex parte Robinson,* 19 Wall. 505; *Windsor* v. *McVeigh,* 93 U. S. 274; *Galpin* v. *Page,* 18 Wall. 350; *In re Holt,* 55 N. J. L. 384.

Petitioner was denied the assistance of counsel for his defense. No notice was given him of the charge, though the trial judge consumed ten days after receiving the letter in which it appears he engaged the services of a special prosecutor from another city, formulated the charge, prepared for the prosecution; then, after such careful preparation, a marshal is sent out to bring petitioner under arrest *instanter* before the court, where he

is denied all reasonable opportunity to consult counsel, or to obtain the assistance of counsel for his defense. The fact that this is a criminal prosecution and that defendant was denied the assistance of counsel for his defense can not be, and is not, denied. It is the assistance of counsel that the Constitution guarantees. The right of counsel, even if granted, without the right of consultation is barren and fruitless. The arrest, the alleged hearing, the conviction and the incarceration of defendant all occurred in a very short space of time in the forenoon, and defendant during all of that time was in the custody of the marshal or before the bar of the court in custody, with no opportunity either to employ or consult with counsel.

Defendant was not allowed to plead to the charge, and the common law right to purge himself by his oath was denied him. *Craig* v. *Hecht,* 260 U. S. 714. The only objection to the letter apparently urged in the purported charge is the statement of the defendant's former opinion that the judge was big enough and broad enough to overcome the bias and prejudice admittedly existing, and the conclusion that he was mistaken therein. This is not a contempt. It is merely the statement of a truth, which this record clearly discloses. It is an unfortunate situation that a lawyer may, with flattery and praise, seek to and actually influence judicial action, but he cannot speak the truth with candor without being sent to jail. This is not as it should be. *Ex parte Robinson, supra; Hovey* v. *Elliott,* 167 U. S. 409; *McVeigh* v. *United States,* 11 Wall. 259; *Windsor* v. *McVeigh,* 93 U. S. 277; *Galpin* v. *Page,* 18 Wall. 350; *In re Pittman,* 1 Curt. (U. S.) 186.

Petitioner was convicted without being confronted by any witnesses or evidence against him, and there is no evidence of guilt in the record to sustain the conviction.

The record on appeal was wrongfully altered after the appeal was perfected by arbitrarily striking out defend-

ant's answer and motion in arrest of judgment, and for a new trial; and the court's refusal to act on the same was a refusal to perform the duties required of it by law; and striking the papers from the record on appeal after appeal was perfected was an invasion of the province and jurisdiction of appellate courts, and deprived petitioner of substantial legal rights. A sentence imposed for an offense not charged is void.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom *Solicitor General Beck* was on the brief, for the United States.

Petitioner was guilty of contempt, § 725, Rev. Stats. This act is not the source, of course, of the power of the federal courts to punish contempts. It but restricts their inherent power. Under it they can only punish as contempt "the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice."

Petitioner's act in writing and delivering the letter, was in the "presence of the court." *In re Savin, Petitioner,* 131 U. S. 267. It was also "misbehavior" to say to the judge in writing, as the petitioner here did, that in a case just ended and in which a motion for a new trial was pending, he had proved himself not big enough and not broad enough to restrain his bias and prejudice against a litigant; that in his conduct of the trial he had manifested such prejudice and bias; and that he was possessed of this prejudice and bias against the litigant because he had permitted slanders to be whispered in his ears; to say to the judge that the petitioner's hopes that the judge would conduct himself as a judge should had been shattered by the judge's conduct, and not only shattered but rudely shattered; to say all of these things, and in substance they were all said in the petitioner's letter, was patently to offer insult to the court and openly to impeach his honor both as judge and man. Certainly it is no defense

to say that there were parts of the letter that were not improper, or that much of it might lawfully have been incorporated in an affidavit to disqualify the judge in cases not yet tried. There remains the offending language which had no reference to the cases yet for trial but referred solely to the case still pending on motion for new trial.

Petitioner was accorded a fair hearing. The word "warrant" as used in the Fourth Amendment has never been held to include an attachment to answer for contempt of court. It has been repeatedly held that in a case of a direct contempt neither affidavit, notice, rule to show cause, nor other process, is a necessary prerequisite to the court's jurisdiction to punish the contempt. *In re Terry*, 128 U. S. 289. The petitioner waived any objection to the basis of the attachment by pleading orally and in writing to the charge upon its merits. This objection is contained in none of the assignments of error.

Neither *Phillips S. & T. Co.* v. *Amalgamated Ass'n.*, 208 Fed. 335, nor *Sona* v. *Aluminum Castings Co.*, 214 Fed. 936, was a case of direct contempt committed in the presence of the court. No formal charge whatever was necessary in case of a contempt committed in the presence of the court. The statute does not require that the "misbehavior," if committed in the presence of the court, must *also* be of such character as to "obstruct the administration of justice." That qualification is required only as to misbehavior not committed "in the presence of the court." *Ex parte Hudgins*, 249 U. S. 378; *Ex parte Craig*, 274 Fed. 177 distinguished.

Article IV of the Amendments providing that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation," is one of those constitutional limitations which this court said in the *Hudgins Case, supra*, did not apply to a contempt committed "in the presence of the

court." Moreover, the record clearly shows that in truth and fact the petitioner was fully informed as to the charge against him before he undertook to state his defense.

As for Article VI, relating to the right of counsel in all criminal prosecutions, the inapplicability of this amendment, with its several guarantees, including that of trial by jury, to a proceeding for the summary punishment of contempt in the presence of the court is so well recognized that discussion of it is idle. One charged with a direct contempt committed in the presence of the court has not the right to plead formally to the charge. Here again the *Hudgins Case* is in point and decisive. The most petitioner was entitled to was opportunity to deny authorship of the offending letter, since it was delivered by the hand of another although in his presence. But he admitted authorship. There was nothing that might have been proper subject matter of any further hearing. Such hearing as he was entitled to he had.

Petitioner was deprived of no legal right by any failure to transmit to the Circuit Court of Appeals what purported to be an answer admittedly offered for filing after writ of error had been allowed.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the Court.

The first objection to the sentence of the court, made on behalf of the petitioner, is that the letter written to the judge is not a contempt of the court. Section 21 of the Judicial Code contains the following:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last

preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

It is said that all that the petitioner intended to do by this letter was to advise the court of the desire of his client to have another judge try the four cases yet to be heard, and of his own desire to avoid the necessity of filing an affidavit of bias under the above section in those cases by inducing the regular judge voluntarily to withdraw. Had the letter contained no more than this, we agree with the Circuit Court of Appeals that it would not have been improper.

But we also agree with that court that the letter as written did more than this. The letter was written the morning after the verdict in the heat of the petitioner's evident indignation at the judge's conduct of the case and the verdict. At least two weeks would elapse before it was necessary to file an affidavit of bias in the other cases.[1] The letter was written and delivered pending further necessary proceedings in the very case which aroused the writer's anger. While it was doubtless intended to notify the judge that he would not be allowed to sit in the other cases, its tenor shows that it was also written to gratify the writer's desire to characterize in severe language, per-

[1] The next term of the court at Forth Worth would have been the second Monday in March (Judicial Code, § 108) so that the affidavit required by § 21 for disqualification need not have been filed before March 2nd. The letter was written February 15th.

sonally derogatory to the judge, his conduct of the pending case. Though the writer addressed the judge throughout as "Your Honor", this did not conceal but emphasized the personal reflection intended. The expression of disappointed hope that the judge was big enough and broad enough to overcome his personal prejudice against petitioner's client and that the client would have the privilege of rebutting the whispered slanders to which the judge had lent his ear, and the declaration that his confidence in the judge had been rudely shattered, were personally condemnatory and were calculated to stir the judge's resentment and anger. Considering the circumstances and the fact that the case was still before the judge, but without intending to foreclose the right of the petitioner to be heard with witnesses and argument on this issue when given an opportunity, we agree with the Circuit Court of Appeals that the letter was contemptuous.

But while we reach this conclusion, we are far from approving the course of the judge in the procedure, or absence of it, adopted by him in sentencing the petitioner. He treated the case as if the objectionable words had been uttered against him in open court.

To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry*, 128 U. S. 289. It was there held that a court of the United States upon the commission of a contempt in open court

might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law.

The important distinction between the *Terry Case* and the one at bar is that this contempt was not in open court. This is fully brought out in *Savin, Petitioner,* 131 U. S. 267. The contempt there was an effort to deter a witness, in attendance upon a court of the United States in obedience to a subpoena, while he was in a waiting room for witnesses near the court room, from testifying, and the offering him money in the hallway of the courthouse as an inducement. This was held to be "misbehavior in the presence of the Court" under § 725 R. S. (now § 268 of the Judicial Code). The Court, speaking by Mr. Justice Harlan, said (page 277):

"We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form,' *Ex parte Terry,* 128 U. S. 289, 309; whereas, in cases of misbehavior of which the judge can not have such personal knowledge, and is informed thereof only by confession of the party, or by testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286."

This difference between the scope of the words of the statute "in the presence of the court," on the one hand, and the meaning of the narrower phrase "under the eye or within the view of the court," or "in open court" or "in the face of the court," or "in *facie curiae*," on the other, is thus clearly indicated and is further elaborated in the opinion.

We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice," as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it.

When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not important. The Court in *Randall* v. *Brigham*, 7 Wall. 523, 540, in speaking of what was necessary in proceedings against an attorney at law for malpractice said:

"All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

The Court in *Savin, Petitioner,* 131 U. S. 267, applied this rule to proceedings for contempt.

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. See *Hollingsworth* v. *Duane,* 12 Fed. Cases 359, 360; *In re Stewart,* 118 La. 827; *Ex parte Clark,* 208 Mo. 121.

The proceeding in this case was not conducted in accordance with the foregoing principles. We have set out at great length in the statement which precedes this opinion the substance of what took place before, at and after the sentence. The first step by the court was an order of attachment and the arrest of the petitioner. It is not shown that the writ of attachment contained a copy of the order of the court, and we are not advised that the petitioner had an exact idea of the purport of the charges until the order was read. In such a case, and after so long a delay, it would seem to have been proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged. See *Hollingsworth* v. *Duane,* 12 Fed. Cases 367, 369. Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest.

After the court elicited from the petitioner the admission that he had written the letter, the court refused him time to secure and consult counsel, prepare his defense and call witnesses, and this although the court itself

had taken time to call in counsel as a friend of the court. The presence of the United States District Attorney also was secured by the court on the ground that it was a criminal case.

The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this, where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court can not exclude evidence in mitigation. It is a proper part of the defense. There was a suggestion in one of the remarks of the petitioner to the court that, while he had dictated the letter he had not read it carefully, and that he had trusted to the advice of his partner in sending it; but he was not given a chance to call witnesses or to make a full statement on this point. He was interrupted by the court or the counsel of the court in every attempted explanation. On the other hand, when the court came to pronounce sentence, it commented on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and in employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client. When Walker questioned this, the court directed the marshal to prevent further interruption. It was quite clear that the court considered the facts thus announced as in aggravation of the contempt. Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet or explain them, before the sentence. We think the procedure pursued was unfair and oppressive to the petitioner.

Another feature of this case seems to call for remark. The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. *Cornish* v. *The United States,* 299 Fed. 283, 285; *Toledo Company* v. *The United States,* 237 Fed. 986, 988.

The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows. We think, therefore, that when this case again reaches the District Court to which it must be remanded, the judge who imposed the sentence herein should invite the senior circuit judge of the circuit to assign another judge to sit in the second hearing of the charge against the petitioner.

Judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.